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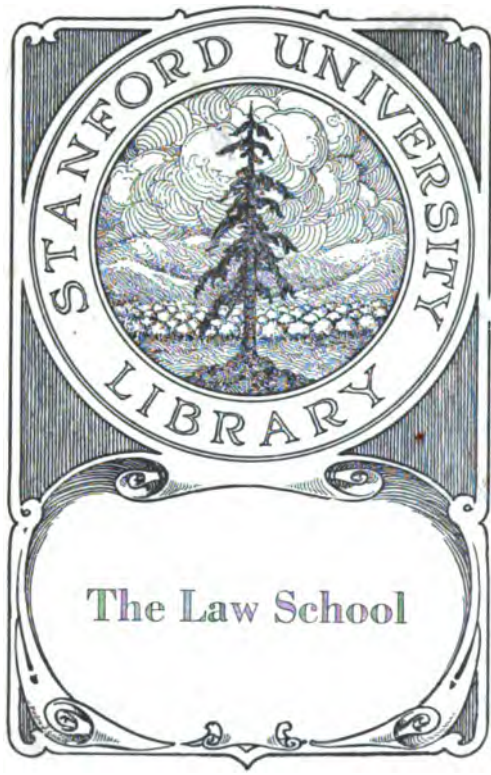
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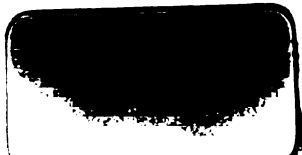
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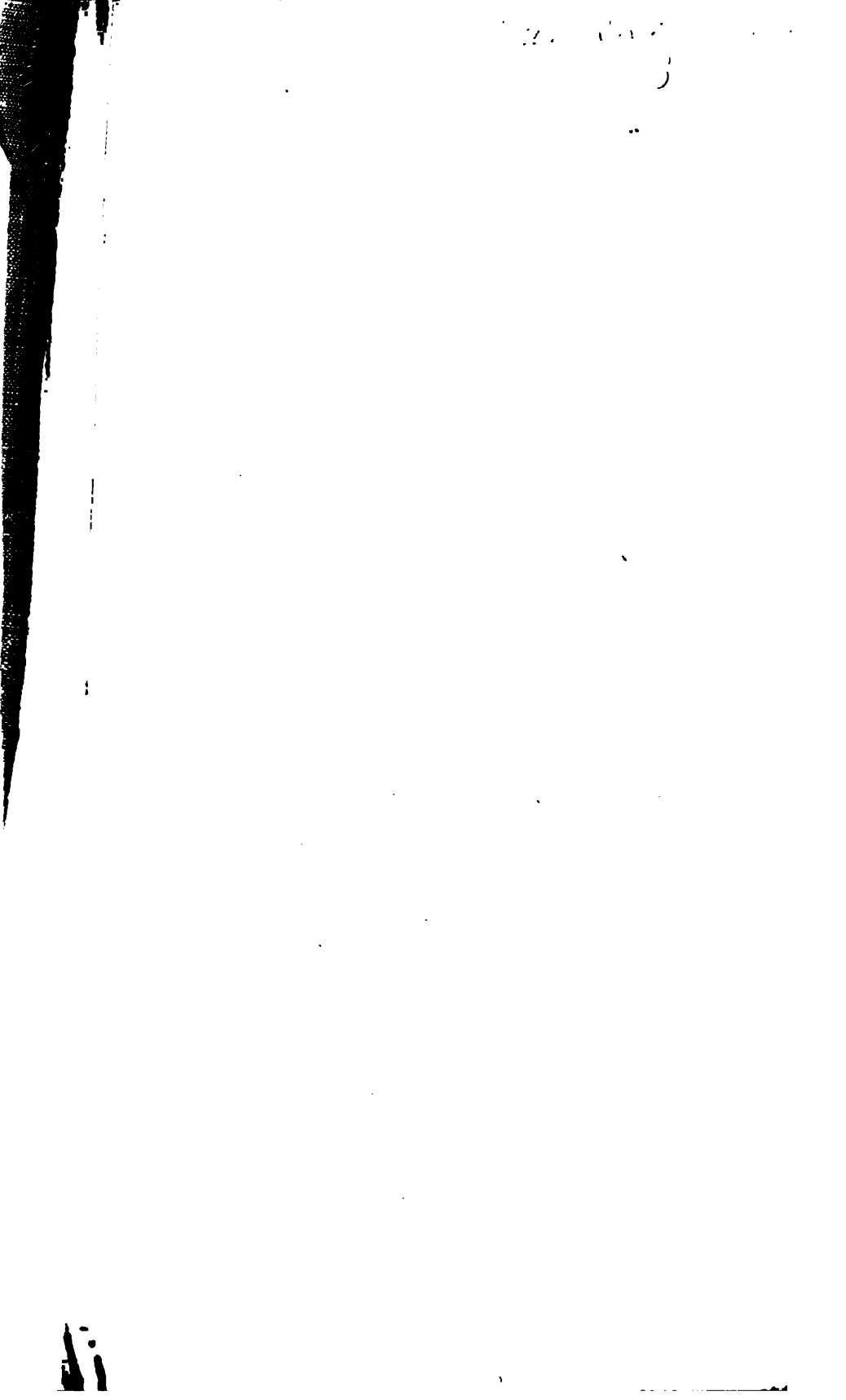


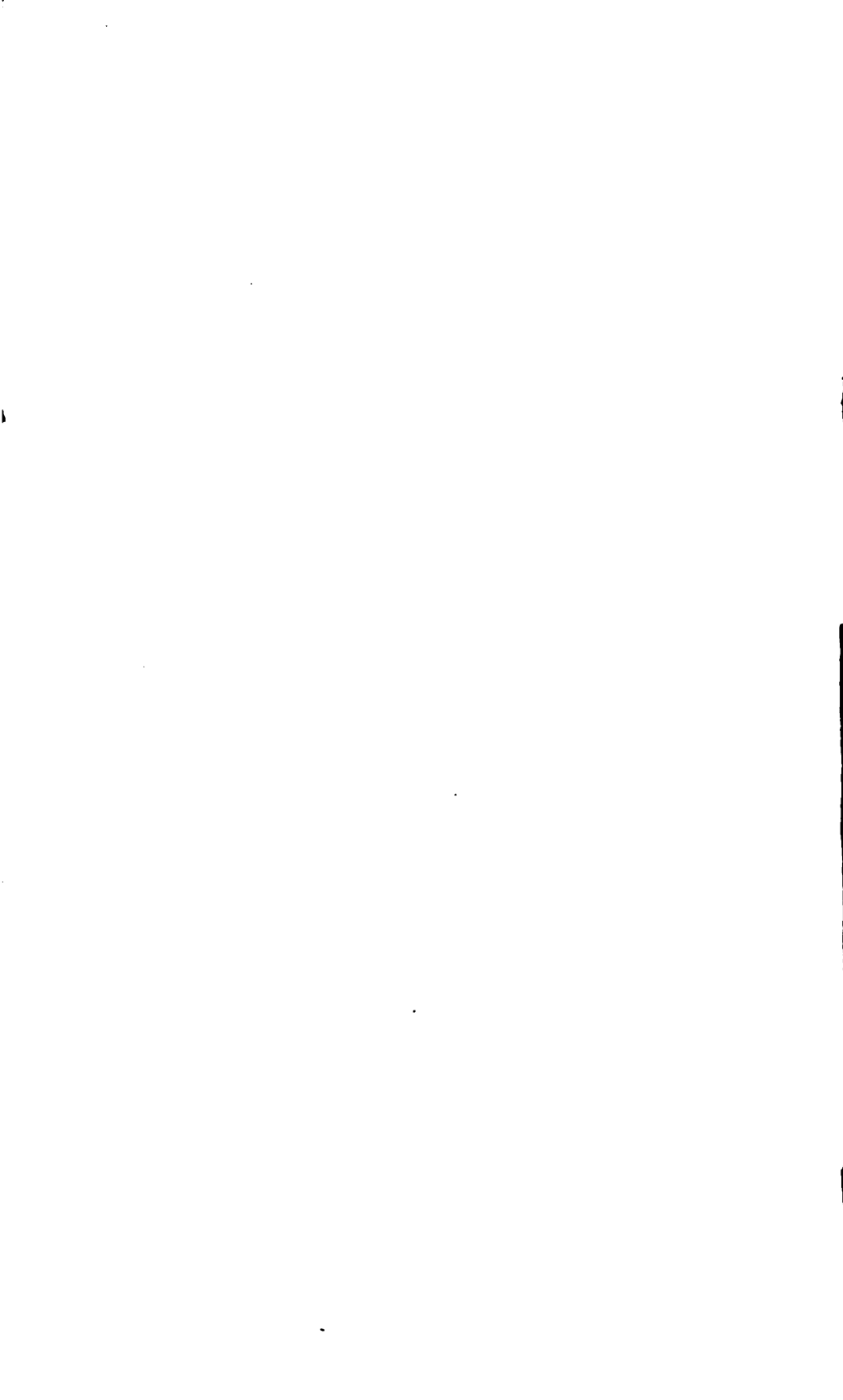
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Court of Common Pleas,
OTHER COURTS,
With Tables of the Cases and Principal Matters.

By **PEREGRINE BINGHAM,**
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. III.
FROM **MICHAELMAS TERM, 6 GEO. IV. 1825, TO**
TRINITY TERM, 7 GEO. IV. 1826,
BOTH INCLUSIVE.

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J U D G E S
OF THE
COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

The Right Hon. Sir WILLIAM DRAPER BEST, Knt.
Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir STEPHEN GASELEE, Knt.



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ARGUED AND DETERMINED

1825.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Sixth Year of the Reign of GEORGE IV.

CHOLMELY v. PAXTON and Others.

April 20.

THIS was a writ of formedon in which, in the last term, *Cross Serjt.* had obtained a rule *nisi* to withdraw a demurrer, and reply *de novo*. Against this rule *Bosanquet* and *Peake Serjts.* shewed cause in the same term, objecting that there was no affidavit of any special cause for which the alteration was required; that there was no precedent for such a course; and that the Courts were as averse to indulgence in a formedon as in a writ of right. They referred to *Scott v. Perry* (a), *Hull v. Blake* (b), *Dunsday v. Hughes* (c), *Charlwood v. Mar-*

Demandant allowed to withdraw demurrer and reply *de novo* in a writ of formedon, upon shewing good ground by affidavit.

(a) 3 *Wils.* 207.

(b) 4 *Taunt.* 572.

(c) 3 *B. & P.* 453.

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gan (a), and *Turner v. Palmer (b)*, to shew the rigor of the courts with regard to applications similar to the present.

The Court required an affidavit at the hands of the applicant, and ordered the rule to be enlarged to this term; when the affidavit being produced, and disclosing, among other important matters, that the demandant's right accrued only in 1822,

BEST C. J. said, The Court never doubted that it had authority to amend, even in writs of right, and considering that the demandant's title accrued only in 1822, they thought it right to allow the amendment.

Rule absolute.

(a) 1 N. R. 64.

(b) Cro. Car. 74.

April 21.

ROWLEY v. HORNE.

To fix a Plaintiff with knowledge of a general notice by which a coach proprietor had limited his responsibility, it was proved that the Plaintiff had taken in for three years a newspaper in which the notice had been advertised once a week; the jury having nevertheless found a verdict against the proprietor, the Court refused a new trial,

ACTION against a carrier for losing a parcel of bank notes which the Plaintiff had forwarded by his coach. At the trial before *Garrow B.*, last *Stafford* assizes, the defence set up was, that the Defendant had, by a general notice, given out that he would not be responsible for parcels of any value unless certified at the time of booking, and paid for accordingly; and that no intimation had been given of the value of the Plaintiff's parcel. To bring the knowledge of this notice home to the Plaintiff, it was proved on the part of the Defendant that the Plaintiff had taken in for three years a weekly newspaper in which the notice had been advertised once a week; the jury having nevertheless found a verdict against the proprietor, the Court refused a new trial,

which

which the Defendant's notice had always been advertised. The jury, however, found a verdict for the Plaintiff to the amount of the loss he had sustained.

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Vaughan Serjt. now moved for a new trial.

But the Court thought the verdict perfectly right; and that it could not be intended a party read all the contents of any newspaper he might chance to take in. They said that carriers, who wished by means of a notice to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person who brought a parcel for conveyance a printed paper containing the notice.

Rule refused.

TENNY, on the several Demises of HENRY GIBBS, *April 22.*
 CHARLES GIBBS, GEORGE GUNNING, ROBERT
 GUNNING, and WILLIAM GUNNING, v. MOODY.

THIS was an ejectment, brought to recover possession of two-fourths of certain mills, upon a forfeiture of a term in them, by non-payment of rent, according to a difference between the amount of rent proved to be due and the amount demanded in the lessor of the Plaintiff's particular is not material.

C. devised lands to a feme covert for her life, and then to the intent that she or her husband should not be entitled to receive the rents of the tenant, appointed trustees to receive them, pay them over to the wife, and attend to repairs; with power to distrain, lease, &c. By a codicil *C.* revoked the devise in the will, the trustees named therein having died, and devised the land to other trustees, to the same intents, and in the same manner in all respects, as if the new trustees had originally been named trustees in the will:

Held, that the new trustees took the legal estate in the land.

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to the conditions of a lease under which they had been demised to the Defendant by *Miss Callant*, entitled to two-fourths, and *Henry and Charles Gibbs* entitled to one-fourth.

At the trial before the Chief Baron, last *Kent* assizes, it appeared that six quarters' rent were in arrear; that the lessors of the Plaintiff had in their particular claimed seven, and that the title of the *Gunnings* to the two-fourths arose on the following passages in the will and codicil of *Miss Callant*, who had died subsequently to the execution of the lease to the Defendant.

1809, December 15th. *Ann Callant*, of the city of *Rochester*, spinster, by will, of this date, gave and devised (*inter alia*) her moiety or half part of and in a paper-mill, with the appurtenances, at *Hawley*, in the parish of *Sutton-at-Hone*, in *Kent*, then in the occupation of *James Robson*, his assigns or under-tenants,

Unto her niece, *Amelia Brooke Westcott*, otherwise *Amelia Brooke de Varreux*, wife or reputed wife of *John Baptiste Charles Count Toulre de Varreux*, formally of the kingdom of *France*, but then a *French* emigrant, residing in *Upper Norton Street*, in *Middlesex*, for life, (subject to the directions thereafter mentioned and declared concerning the same estates and premises, and the rents and repairs thereof, and other matters relating thereto,) and immediately after the decease of her said niece, to the uses therein mentioned:

And said testatrix declared, that, notwithstanding she had given and limited said estates to her niece and her children, and to her nephew, upon the contingencies therein mentioned, yet, to the intent and purpose that she or he should not be entitled to receive of and from the several tenants the rents thereof, nor that any neglect of needful and proper repairs might happen, the testatrix did thereby nominate and appoint *George Gunnings* and *George Hicks*, and the survivor of them, his
executors

executors or administrators, receivers of the rents of said estates, with full power to make distresses on non-payment thereof; and desired and directed that thereby and thereout they should keep the same and every part thereof in good and tenantable repairs and condition; and that after discharge of this, and of every other necessary outgoing, they should pay the clear or net rents and profits to her said niece during her life, for her own sole and separate use, independent of said Count *de Varreux*, or any future husband, and free from his control, and all his debts and undertakings whatsoever; and for which rents and profits her receipts should be a sufficient discharge to said receivers or trustees.

Power to trustees to grant leases for life.

Ann Callant afterwards made a codicil, bearing date 1821, *February 7th*, reciting the before-mentioned will, — that said *George Gunning* and *George Hicks* had both departed this life, — and that testatrix was desirous to appoint the three sons of her late friend *George Gunning*, namely *George Gunning*, *Robert Gunning*, and *William Gunning*, to be trustees and executors of her said last will and testament.

And testatrix did thereby revoke and make void all and singular the devises and bequests in her said will and testament contained, of all her real and personal estates and every part thereof, to said *George Gunning* and *George Hicks*, upon and for certain trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and directions therein expressed and declared of and concerning the same; and in lieu thereof, testatrix gave, devised, and bequeathed all and singular the real and personal estates, goods, chattels, rights, and credits, and every part and parcel thereof, unto said *George Gunning* (the son), *Robert Gunning*, and *William Gunning*, their heirs, executors, administrators, and assigns, according to the nature of the respective estates,

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upon and for the several and respective trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, conditions, and directions in said will and testament expressed and declared, of and concerning the same estates and premises respectively, in the same manner in all respects as if the said *George Gunning* (the son), *Robert Gunning*, and *William Gunning*, had all of them been originally named as trustees and executors of said last will and testament, instead of said *George Gunning* and *George Hicks*, deceased.

And said testatrix did thereby nominate, constitute, and appoint said *George Gunning* (the son), *Robert Gunning*, and *William Gunning*, to be the executors of her said last will and testament.

The will and codicil were proved in the prerogative court of *Canterbury*, 3d *December* 1821, by the three executors named in the codicil.

A verdict having been found for the lessor of the Plaintiff,

Taddy Serjt. moved for a rule *nisi* to set aside this verdict, and enter a nonsuit, on the ground, first, that the variance between the sums claimed in the particular, and the sum proved to be actually due, was fatal. At common law, the demand preliminary to a forfeiture was required to be made with the utmost precision; and if there was any inaccuracy, either as to the amount or the mode of making the demand, it failed of its effect. The present mode of proceeding, having been substituted for that at common law, ought to be pursued with equal caution, and watched with equal jealousy. If the Defendant had known the sum claimed to have been that which was really due, he might have paid it into court, under 4 G. 2. c. 28.

Secondly,

Secondly, the trustees named in the will took no legal estate under it: the land is limited to Mrs. *Varreux* for life, and there is no devise to them; while they are invested with a power to distrain and lease, which would have been unnecessary if they had taken the legal estate. They have nothing to do but to pay money over to their *cestui que* trust; and where the functions of trustees are such as to not require them to be invested with the legal estate, the Court will not confer it on them, unless there be an express devise; *Shapland v. Smith (a)*, *Doe dem. Leicester v. Biggs. (b)* Then the trustees named in the codicil are ordered to take in the same way as if they had been named in the will, which makes their interest the same as the trustees in the will would have taken.

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BEST C. J. There is no ground for either of the objections which have been raised against this verdict. With respect to the first, it has been insisted, that at common law a precise demand was a necessary preliminary to a forfeiture; it does not follow, however, that even at common law the precision which would have been necessary in the demand must also have been carried into the particular; but now the demand at common law is dispensed with under the provisions of 4 G. 2.; and if no demand is necessary the Plaintiff's case cannot be affected by the mere amount claimed in the particular. Then it has been insisted, that three of the lessors of the Plaintiff have no legal title by the will under which they claim. Whatever doubt, however, might exist as to the construction of the will, is cleared away by the codicil. In that, the testatrix clearly gives the estate to the lessors in question: "I give, devise, and bequeath all and singular my real and personal estates, goods, chattels, rights, and credits, unto *George Gunning*,

(a) 1 Br. Ch. Cas. 75.

(b) 2 Taunt. 109.

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Robert Gunning, and William Gunning, their heirs, executors, administrators, and assigns." These words give them the legal estate. If so, is it in this instance transferred to the *cestui que* trust under the statute of uses? That might be so, if, as in *Doe dem. Leicester v. Biggs*, the trustees had nothing to do. Here they have duties to perform: they are to receive rents and to see to repairs; and though the powers which have been given in the will were unnecessary to persons having the legal estate, yet the very insertion of the powers shews that the trustees were intended to act.

PARK J. The difficulty of making a demand correctly at common law, with a view to a forfeiture, was one of the reasons which occasioned the passing of the 4 G. 2., and I do not know that such a degree of precision was ever required for a particular as is now contended for. Though, under the 4 G. 2., the Plaintiff must prove that at least half a year's rent is in arrear, it does not follow that he is confined to that sum in his particular.

BURROUGH J. concurred.

GASELEE J. I have no doubt in this case. I am not satisfied that the trustees do not take the legal estate, even under the will, for if it can be collected from the whole will that they were intended to do so, particular words of devise are not necessary; but upon the codicil there can be no question. In *Doe dem. Leicester v. Biggs* the trustees had nothing to do, but were merely to permit and suffer the devisee to receive the rent; and the distinction is this, that if there be any thing for the trustees to do, beyond merely paying money over, they take the legal estate: here they are called on to lay out money in repairs. In *Silvester dem. Law v. Wilson (a)*,

(a) 2 T. R. 445.

which

which followed *Shapland v. Smith*, the trustee was to apply the rents received, to the maintenance of the testator's sons, which *Ashhurst J.* relied on as a circumstance to shew that the testator intended the trustees to have a control over the money; and in *Shapland v. Smith*, where they were to see to repairs, they were holden to take the legal estate; so that it is clear on this will, that the female was not intended to take an executed use. On the first point raised I entertain no doubt; it is sufficient, if at the trial the lessor of the Plaintiff shews half a year's rent to be due, and the Defendant is not injured by any excess in the particular.

Rule refused.

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REEDER v. BLOOM.

April 21.

WHEN the costs were taxed for the Plaintiff, who had obtained judgment in this case, it was objected, on the part of the Defendant, that the person acting as attorney for the Plaintiff had not taken out his certificate for the years 1819, 1820, and 1821; had never been re-admitted, and, therefore, under 37 G. 3. c. 90. was incapable of practising.

The circumstance that the Plaintiff's cause has been conducted by one who is not an attorney does not deprive the Plaintiff of his right to full costs against Defendant.

An application having been made to a Judge at Chambers, he ordered the Defendant to pay the costs into court, subject to a motion to refund them; this was done, and there were conflicting affidavits as to the fact, whether or not the party in question was an attorney.

Wilds Serjt. now moved that such portion of the costs as would go to the Plaintiff's attorney for his services as attorney

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attorney might be refunded. He urged, that the person who had acted for the Plaintiff, not being an attorney, the Plaintiff could not be called on to pay him for services in that capacity; and that the Defendant ought not to pay as costs an expence which the Plaintiff could never be called on to incur; that it was as much the right and interest of the Defendant as of the Plaintiff that the Plaintiff's cause should be conducted by a regular attorney, since the Court had not, in case of misconduct, the summary jurisdiction over other persons which it possessed over attorneys; and that in the King's Bench costs were not allowed to a person who conducted a suit, not being an attorney. He referred, also, to the statutes 2 G. 2. c. 23. s. 17., 22 G. 2. c. 46. s. 11., 37 G. 3. c. 90. s. 30, 31., by which attorneys who practise without due admission are rendered liable to punishment. ◀

BEST C. J. If we acceded to this motion, a Plaintiff, in addition to his own cause, would also have, in every instance, to try another, to ascertain whether or not his agent were an attorney. But we think there is no ground for the motion. In cases like the present the Court has always guarded against touching the right of the suitor, and has visited the offence on the party offending. It is now proposed, that the Plaintiff should lose his costs because his attorney has no certificate; but in what a situation would this place the Plaintiff, if, as is usual, he makes at the outset advances to his attorney. The statutes shew that the legislature never intended to touch the suitor, because all the punishment they inflict is directed against the attorney, who, if he practises without a regular title, is disabled to sue for his costs. Our power is sufficient, without pursuing the course which has been pointed out, because if a person practises whose name is not on the
the

the rolls, he is guilty of a contempt which the Court may punish, and make him do justice to all parties.

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PARK J. It would be most dangerous to suitors at large, if we were to grant this motion. The meaning of the statutes is, that if a non-attorney sues for his extra costs, he shall not recover them against his client.

The rest of the Court concurring, the rule was
Refused.

DOE Dem. UPTON and Others v. WITHERWICK. *April 26.*

THE Defendant's term having expired on the 6th of *Several crops*
April 1824, and he having refused to quit, the *having been*
lessors of the Plaintiff were put in possession of the *taken under*
premises under an *an habere* *facias possessionem* in the ensu- *facias posses-*
ing *August,* at which time some grass crops were lying on *sionem* issued
the ground, together with nine acres of oats, which the *on an eject-*
Defendant had recently severed, alleging that he was *ment brought*
entitled to them as a way-going crop. Some pigeons, *against a te-*
a copper, and an oven were also taken. *nant for hold-*
ing over, the
Court refused

a rule for the
lessors of the
Plaintiff to pay
over the value
of them to the
Defendant
after deduct-
ing the amount
of rent due.

Peake Serjt., in the last term, had obtained a rule *nisi* for the lessors of the Plaintiff to pay over to the Defendant such sum as the prothonotary should allow for the value of the crops and other articles taken possession of by them under the writ of *habere facias possessionem* issued in this cause, deducting the amount of rent due to them from the Defendant; against which

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Spontie Serjt. now shewed cause, alleging that the motion was of the first impression, and would, if made absolute, operate in the same way as a bill in equity, placing the Court under the necessity of interfering in the most complicated concerns of landlord and tenant; that the Defendant was himself a trespasser, and had no ground of complaint; and that as there had been no abuse of process, no reason could be adduced for the interference of the Court. The claim for a way-going crop, if well founded, might be asserted in a different manner.

Peake relied on the Defendant's claim to the way-going crop, and insisted that the Court had a discretionary authority over their own process for the purpose of preventing injustice.

The Court were clearly of opinion that the motion was of the first impression; that to entertain it would be productive of pernicious consequences, and offer an inducement to tenants to hold over property; that if the Defendant had any claim to a way-going crop he might assert it in an action against his landlord; but as in truth he appeared to have no merits, they discharged the rule, with costs.

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GLOVER v. MONCKTON.

April 27.

THE Master of the Rolls directed the following case for the opinion of this Court :

William Cheshire Glover by his last will and testament, duly executed and attested to pass real estates, devised all his real and personal estates to *T. Birch* and *W. E. Hammond*, and their heirs, executors, and administrators, upon trust, that they or the survivor of them, or the heirs, executors, or administrators of such survivor, should by and out of the rents, issues, profits, and produce of all or any part of the said real or personal estates, yearly and every year pay and apply the sum of 250*l.* towards the maintenance and education of the devisor's daughter, *Ann Julia Glover*, or so much thereof as would be necessary for that purpose, the residue thereof to accumulate for the use and benefit of his said daughter, and be paid or made payable to her, when she should arrive at the age of twenty-one years, or on the day of her marriage with the consent of the said trustees, whichever should first happen : and upon further trust, that they should pay and apply so much of the residue of the rents, produce, and profits of the

Devisor of lands and personalty, in trust out of the rents to apply 250*l.* a year to the maintenance of devisor's daughter till she should be twenty-one, or marry, and out of the residue as much as should be thought necessary for the maintenance of devisor's son till he should be twenty-one or his sister marry, and upon his attaining twenty-one or his sister's marrying, to raise 5000*l.*, and pay the interest of it to

the daughter after her attaining twenty-one or marrying ; and subject thereto that the trustees should stand seized of the residue in trust for the son till he attained twenty-one, and then to the use of the son, his heirs, executors, and administrators for ever. But in case the son should die under twenty-one and the daughter survive, or in case the son should live to twenty-one and afterwards die without lawful issue,—to the use of the trustees till the daughter attained twenty-one or married, and then to the use of the daughter for life, with divers remainders over :

Held, that the trustees took the legal estate till the 5000*l.* was raised, and that but for the intervention of the trustees the son would have taken a fee with an executory devise over in the event of his dying without issue living at the time of his death.

said

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said real and personal estates as they should in their discretion think necessary, for the maintenance and education of the devisor's son, *William Cheshire Glover*, (the above named Plaintiff,) until he should attain the age of twenty-one years, or the day of marriage of devisor's said daughter, which should first happen; and when and as soon as his said son should have attained the age of twenty-one years, or his said daughter should be married with such consent as aforesaid, then upon this further trust, that they should with all convenient speed, by mortgage, sale, or other disposition of all or any part of the said real or personal estates, levy and raise, or borrow and take up at interest the sum of 5000*l.*, and should stand possessed thereof when so raised as aforesaid, upon trust to pay the same and the interest thereon from the time when devisor's said daughter should arrive at the age of twenty-one years, or be married with such consent as aforesaid, unto the said daughter: but in case the said daughter should arrive at the age of twenty-one years; or be married in devisor's lifetime, then his will and meaning was, that the said sum of 5000*l.* should be raised and paid in manner aforesaid, as soon as conveniently might be after his decease, with interest from the time of his decease: and subject to the payment of the said sum of 5000*l.* so to be raised as aforesaid, and the interest thereof in manner aforesaid, then that the trustees should stand seised and possessed of the residue of the said real and personal estates after such sale or other disposition as aforesaid, in trust for the sole use and benefit of his said son until he should attain the age of twenty-one years, and when and so soon as he should arrive at the age of twenty-one years; then subject as aforesaid *to the use of* and in trust for his said son, his heirs, executors, administrators, and assigns for ever, according to the nature of the said estates

tates respectively: but in case his said son should not live to attain such age of twenty-one years, and his said daughter should be living at the time of the decease of his said son, *or in case his said son should live to attain such age, and should afterwards die without lawful issue,* then as, to, for, and concerning all his said real estates, to the use of the said trustees and the survivors or survivor of them, and the heirs and assigns of such survivor, until his said daughter should attain the age of twenty-one years, or the day of her marriage with such consent as aforesaid, and *then to the use of his daughter for life*; remainder to trustees to support contingent remainders; remainder to the first and other sons of his daughter in tail male successively; remainder to the daughters of his daughter as tenants in common in tail, with cross remainders between them; remainders over in like manner to the devisor's brother and nephew successively for life, (with trustees to support contingent remainders,) and to their sons successively in tail general; remainder to devisor's own right heirs. Then followed various dispositions of personal estate in case devisor's son "should not live to attain the age of twenty-one, or living to attain such age, should afterwards die and should not *leave* lawful issue of his body:" provided always, that in case it should be necessary for raising the said sum of 5000*l.* bequeathed to his said daughter, and for other the purposes contained in his will, either to make sale, or otherwise dispose of or mortgage all or any part of his said real and personal estates, then he thereby gave the trustees full power and authority so to do, and that their receipts should be a sufficient discharge to the purchaser; and he thereby empowered them at any time to lay out and invest any part or parts of his personal estate at interest, on real or other securities, in some of the public funds,

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funds, and from time to time to alter and transpose such securities or funds.

At the time of the commencement of the suit, *Ann Julia Glover* had attained twenty-one, but the 5000*l.* had not been paid or raised out of the real estate, and the testator's personal estate was not sufficient to discharge it.

The questions for the opinion of the Court were :

What estate does the said *William Cheshire Glover*, the devisee, take in the testator's real estate, under the limitations in his said will, he the said *William Cheshire Glover*, the devisee, having attained the age of twenty-one years ?

And if the Court should be of opinion that the trustees, the said *Thomas Birch* and *W. E. Hammond*, take the legal estate in fee, under the limitations in the said will, then whether the said *William Cheshire Glover*, the devisee, would have taken any and what estate in the testator's said real estates, by virtue of his said will, in case the devise to him had been made without the introduction of trustees, he the said *William Cheshire Glover* having so attained his age of twenty-one years.

Peake Serjt., for the Plaintiff. *W. C. Glover* took under the devise an estate tail. The Court will not establish an executory devise in any case, where, as in the present, there is a sufficient freehold to support a contingent remainder; and the rule is now settled, that where lands of inheritance are devised to one and his heirs, and if he die without issue, then over, that is an estate tail, because the words "if he die without issue" manifest an intent in favour of the issue. In *Doe dem. Ellis v. Ellis (a)*, where the devise was to the devisor's son, his heirs and assigns, but in case his son should die

(a) 9 East, 382.

without issue, then over, it was holden the son took an estate tail. So in *Dansey v. Griffiths* (a) and *Tenny v. Agar* (b), in which cases the expression was, "if he die and leave no issue;" and Lord *Ellenborough* said the general rule was clear, that the words "in case he die without issue," must be construed to mean a general failure of issue. It is true, that in bequests of personalty, the same words have been construed to mean only a dying without issue living at the time of his death; and in *Porter v. Bradley* (c), Lord *Kenyon* thought the same construction ought to be applied in real as in chattel interests; but in *Daintry v. Daintry* (d), he admitted the distinction; and in *Crooke v. De Vandes* (e), Lord *Eldon* confirmed the old rule. In *Roe v. Jeffery* (f), indeed, a devise similar to the present was adjudged to be a devise of the fee with an executory devise over, but in that case it was clearly collected from the whole of the will, that the failure of issue intended by the devisor, was a failure of issue at the death of the first taker. With respect to the trustees, they take a chattel interest, determinable on the devisee's attaining twenty-one. The general rule is laid down in *Doe dem. White v. Simpson* (g), confirmed by *Hawker v. Hawker* (h), that trustees shall not take a fee where a lesser interest is sufficient to enable them to execute the purposes of the trust. Here, it was not necessary for them to take more than a term, in order to raise the 5000*l.*, and they are also furnished with a power which would not have been necessary had they taken the fee.

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Wilde Serjt., contra. The Plaintiff took an equitable estate in fee, with an executory devise over in case of

(a) 4 M. & S. 61.
 (b) 12 East, 253.
 (c) 3 T. R. 143.
 (d) 6 T. R. 314.

(e) 9 Ves. 203.
 (f) 7 T. R. 589.
 (g) 5 East, 162.
 (h) 3 B. & A. 537.

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his not leaving issue living at the time of his death, and the trustee took a legal fee. Admitting the general rule to prevail, as laid down in the cases which have been cited, it may be controlled by an express intention appearing on the face of the will to the contrary, and such an intention appears in the present will, which contains provisions not to be found in any of those which have been the subject of former decisions. The will was evidently framed by a skilful person; many estates tail are properly created; from which it may be inferred, that the limitation in fee was designedly created. If the daughter had died first and then the son, before twenty-one, he must have taken an estate in fee, or no meaning can be attached to the words of inheritance. In most of the cases where the words on which the remainder over was limited, have been holden to give an estate tail to the first taker, the estate to the first taker has not been accompanied, as here, with words of inheritance. But in *Roe v. Jeffery*, where the estate was given to the first taker and his heirs for ever, the first estate was holden to be a fee, and the remainder over good, by way of executory devise. So also in *Doe v. Webber*. (a)

Peake in reply, contended, that the deviser's intention, in the event of the daughter dying first, and then the son, before twenty-one, must be collected from the succeeding limitation and the whole context of the will, from which, including the provisions in respect of personal property, it was clear, that the estate was not intended to go over till a general failure of issue, and that would give the son an estate tail. In *Doe v. Webber* 1000*l.* was ordered to be paid out of the estate to the executors of a person in being, by the person

(a) 1 B. & A. 713.

in remainder, which shewed that the devisor did not mean an indefinite failure of issue, when she limited the remainder over on the first taker's leaving no child or children.

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The following certificate was afterwards sent:

We have heard this case argued by counsel, and having considered it, are of opinion, that the legal estate in the real estates of the testator is in the trustees, *Thomas Birch*, and *William Henry Hammond*, and will continue so until the 5000*l.* shall have been raised as directed by the will. And that *William Cheshire Glover*, the devisee, would have taken an estate in fee in the said testator's real estates, by virtue of his said will, with an executory devise over, in the event of his dying without issue living at his death, in case the devise to him had been made without the intervention of trustees, he, the said *William Cheshire Glover*, the devisee, having so attained his age of twenty-one years.

W. D. BEST,

J. A. PARK,

J. BURROUGH,

S. GASELEE.

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April 30.

MARY DOWSE v. COXE and Another.

Declaration, that a cause being depending in Chancery between *M. D.* and divers infants Plaintiffs, and *T. B.* since deceased, and *J. R.* Defendants, it was ordered, with the consent of the attornies of the parties in the suit, that the matters in question in the suit and all disputes between *M. D.* and *T. B.* should be referred to the arbitrament of *W. C.*, who was to make one or more awards, and in case either of the parties should die, the death was not to abate the reference; that *T. B.* afterwards died before the making of the award; that the arbitrator awarded that the executor of *T. B.* should pay Plaintiff 225*l.* out of *T. B.*'s assets, and that being so liable, the Defendant, executor as aforesaid, promised to pay :

Held, on demurrer, that the action lay against the executor; that the promise sufficiently appeared to have been made in his representative capacity; that a sufficient authority to refer was shewn, and a sufficient award to enable Plaintiff to sue; and that the authority was not revoked by the death of *T. B.*

awards

awards should be made in writing under the hand and seal of the said *William Cooke*, ready to be delivered to the said parties, or to such of them as should require the same, on or before the 29d day of *June* then next, or on or before such ulterior day or days as the said *William Cooke* should from time to time appoint, in writing, by endorsement upon the said order; and in case either of the said parties should happen to die before the making of the final award under the said reference, the said reference was not to abate, but the executors and administrators of the parties so dying were to be considered and taken as parties to the said order, in like manner as their testator or intestate; and the said Plaintiff further said, that afterwards, and before the making of the award of the said *William Cooke*, thereinafter mentioned, to wit, on, &c., the said *Thomas Biddell* died, to wit, at, &c.; and the said Plaintiff further said, that the said *William Cooke* afterwards, and during the time for making his award, to wit, on, &c., at, &c., made his certain award in writing under the hand and seal of him the said *William Cooke*, between the parties aforesaid, of and concerning the said differences; and thereby then and there (amongst other things) awarded, that the said Defendants, as executor and executrix of the said *Thomas Biddell*, deceased, should, out of the assets of the said *Thomas Biddell*, on the 27th day of *July* then next, pay to the said Plaintiff the sum of 225*l.*, of which award of the said *William Cooke*, the said Defendants, as executor and executrix as aforesaid, afterwards, to wit, on the said 7th day of *July*, in the year last aforesaid, had notice, to wit, at, &c.; by reason of which said premises the said Defendants, as executor and executrix as aforesaid, became liable to pay to the said Plaintiff the said sum of 225*l.*, according to the tenor of the said award, to wit, at, &c., and being so liable, they the said Defendants, *executor and executrix* as aforesaid,

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said, afterwards, to wit, on, &c., at, &c., in consideration thereof, undertook, and then and there faithfully promised the said Plaintiff to pay to her the said sum of 225*l.* at the time and in manner as in the said award was directed; and the said Plaintiff in fact said, that though the said Defendants, executor and executrix as aforesaid, were afterwards, to wit, on, &c., requested to pay the said sum of 225*l.* to the said Plaintiff, according to the tenor of the said award, yet the said Defendants, executor and executrix as aforesaid, not regarding their said promise and undertaking, so by them in manner and form aforesaid made, but intending to injure the said Plaintiff in this behalf, did not nor would, when so requested as aforesaid, nor at any time before or since, pay the said sum of 225*l.*, or any part thereof, to the said Plaintiff; but wholly neglected and refused so to do, to wit, at, &c.

To this count there was a demurrer, and the causes of demurrer assigned were, that it is not stated, nor does it appear in the said count, that the said Defendants, before the making of the said award, had any notice of the said supposed submission, or were parties thereto, or were summoned to appear before the said arbitrator, or had any notice of the said supposed submission; and also, for that it is stated, in and by the said count, that the said Defendants personally undertook to pay the said sum of money therein mentioned, whereas no liability or other consideration is stated to support such a promise; and also, for that it is not alleged, nor does it appear, in or by the said count, that the said Defendants had at any time any assets of the said *Thomas Bid-dell*, out of which they could have paid the said sum of money in the said count mentioned, or any part thereof; and also, for that the said count is in other respects uncertain, informal, and insufficient.

Wilde Serjt. in support of the demurrer.

First, the promise alleged to have been made by these Defendants, is a personal promise, for which no consideration is stated. It is not stated that they promised *as* executor and executrix, or that they have assets, but that they, executor and executrix, promised; this language implies a promise which has no connection with the affairs of the testator, and on which, therefore, the Defendants are not responsible. *Henshall v. Roberts.* (a) *Bridgen v. Parkes.* (b)

Secondly, the order of reference is made by consent of attornies only; — of all matters in difference; — and between certain, (not all), of the parties. But *all matters* may comprehend matters out of the suit, which an attorney has not authority to refer; — the infants, in this case, could not appoint an attorney; — and supposing the interest of the infants to be omitted, then an award on part only of the matters referred, is insufficient.

Thirdly, the authority to refer was revoked by the death of *Billett*. It is only by statute that the death of a party, even after verdict, fails to abate a suit, but in every other case, death operates as a revocation of any authority. An agreement by a testator cannot bind his executor to a reference, for if it could, it might operate indirectly to affect the distribution of assets: an award made after revocation is unavailing, (*Vinior's case* (c),) even where the revocation is a contempt of Court. *Clapham v. Higham.* (d) *Bac. Abr. authority* E; and a letter of attorney to deliver seisin after the death of the feoffor is void.

Fourthly, an action cannot be maintained on a non-observance of an order of Court. *Emmerson v. Lashly.* (e)

(a) 5 *East*, 150.

(b) 2 *B. & P.* 424.

(c) 8 *Rep.* 82 a.

(d) 1 *Bingb.* 87.

(e) 2 *H. B.* 248.

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Smith v. Whally. (a) Carpenter v. Thornton. (b) The remedy for such a wrong can only be by application to the Court which issued the order.

Taddy Serjt. contra, was relieved by the Court from arguing the first point.

On the second, he argued, that admitting the award had exceeded the authority, admitting the arbitrator had decided on matters not in difference, or had omitted any that ought to have been included, it was sufficient on this declaration, if the Court could see a *prima facie* authority, sufficient to constitute a consideration for a promise by the executors; that here such an authority sufficiently appeared in the attornies for the parties, for it did not appear that they were merely attornies in the suit, and the Court would not minutely enquire into the nature of the authority, but would enforce an agreement which acknowledged its existence; *Filmer v. Delber (c)*; that it was sufficient for a Plaintiff to set out so much of an award as made for him: *Bac. Abr., Arbitr. G. Banfill v. Leigh (d)*; and that though the submission was by certain persons, and the award only mentioned some of them, it might be taken distributively, especially as the arbitrator was empowered to make more than one award. *Dyer, 216. b. 217. a. 1 Rol. Abr. 246. l. 20.* In *Bacon v. Dubarry (e)*, which might appear conflicting, the award was bad for want of reciprocity. With regard to the infants, it appeared that the proceeding was in Chancery, and it must be presumed, that Court had not proceeded without due regard to the interest of the infants; besides, any defect of authority on their part would only render the award voidable, and not void,

(a) 2 B. & P. 482.

(d) 8 T. R. 571.

(b) 3 B. & A. 52.

(e) 1 Salk. 70.

(c) 3 Taunt. 486.

and

and the infant might agree or disagree at his full age.
Com. Dig., Arbitr. D. 2.

As to the supposed revocation of the arbitrators' authority by the death of *Billett*, though a testator could not bind his executor to submit to arbitration, he might bind him to pay any sum which the testator owed, (*Powell v. Graham* (a), or which he should be found liable to pay under an arbitration already in progress; *Tyler v. Jones* (b): and in orders at *Nisi Prius*, it has often been recommended by the Court to insert a provision that the death of either of the parties shall not suspend the proceedings of the arbitrator. *Cooper v. Johnson*. (c)

The answer to the fourth objection, is, that this action is not brought on an order of court, but on an agreement made in consequence of the order.

Wilde in reply. By the expression "their attornies" must be meant attornies in the suit, (although, technically speaking, there are no attornies in chancery,) because there are no such words in the declaration as "authorised in that behalf," under which the Court could extend the attornies' authority to other matters. Although it may not be necessary to shew the precise nature of the authority, some authority must appear, and none is shewn here. In *Banfill v. Leigh* the party distinctly shewed he was entitled to claim under the award. But in *Cavendish v.* (d) the Court refused to bind an adult where an infant was concerned who might afterwards disagree. In *Mitchel v. Stavelly* (d), the award was holden bad, because all the matters referred were not decided on. Although the statement of the consideration for submitting, includes all the parties submit-

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(a) 7 *Taunt.* 580.(b) 3 *B. & C.* 144.(c) 2 *B. & A.* 395.(d) 2 *Ch. Cas.* 279.(e) 16 *East*, 58.

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ting, the submission is void if there be not an authority from all. *Antram v. Chase.* (a) In *Filmer v. Delber* there was a reference of the cause only. As to the revocation, it is true that a testator may bind his estate to pay a given sum, but a covenant not to revoke an authority is not a covenant to pay.

BEST C.J. The first objection which has been raised, is, that the promise in the declaration is a personal promise for which there is no consideration; I am of opinion that this is not so; that the promise is made by the Defendants as executor and executrix, and is not merely personal; if so, the promise to pay is only a promise to pay out of funds which may come to them as executor and executrix. Looking, indeed, only at particular words, the case might fall within those decisions of the King's Bench which have laid it down, that a promise by parties, executors, without saying *as* executors, is a personal engagement; but on looking to the whole declaration, there can be no doubt, that the promise sufficiently appears to have been made by the Defendants in their character of executors. The declaration states the order of the Vice-Chancellor to refer to arbitration certain matters in dispute; it states the arbitrators' award, that the Defendants should, *out of the assets of Thomas Biddell*, pay to the Plaintiff 225*l.* on the 27th of July then next, of which award the Defendants, *as* executor and executrix, had notice; by reason whereof they became liable *as* executor and executrix, *according to the tenor of the award*; and being so liable, (that is, according to the tenor of the award,) they, executor and executrix as aforesaid, promised to pay; that is, they promised to pay what the arbitrator ordered; which was, a payment out of the assets.

(a) 15 East, 209.

The second objection is, that as to some of the parties the arbitrator was not properly constituted. If the arbitrator has no authority, that is a matter of substance to be urged on general demurrer; but if he has some, and the objection is, that it is not sufficiently comprehensive, that objection ought to be made on special demurrer. I am of opinion, however, that it does sufficiently appear on the face of this declaration, that the arbitrator was regularly appointed to make the award he has made. Whether or not his authority extended to enable him to settle other matters which he might have deemed it expedient to enter on, is another question. The declaration states, that by an order of the Vice-Chancellor it was "ordered, with the consent of the attornies of the parties, that the several matters in question, and all disputes and differences then subsisting between the Plaintiff *Mary Dowse, J. L. Wilkinson, and Mary* his wife, *James May and Susanna* his wife, and *Peter King and Thomas Biddell* deceased, should be referred to the award of *William Cooke, Esquire*, who was to be at liberty to make one or more award or awards of and concerning the matters referred to him.' It has been said, that as infants were concerned in the disputes between these parties, it ought to have been referred to the Master, to ascertain what course was most for the infant's benefit. Whatever was the proper course to be pursued, we may presume, till the contrary appears, that the Court of Chancery has followed it. It is stated, that the reference was ordered with the consent of the attornies of parties in the suit, whence I conclude it was with the consent of persons properly authorised; for, strictly speaking, there are no attornies in the Court of Chancery. It is true that an infant cannot appoint an attorney, but it does not follow that he may not submit to arbitration, or that his next friend

may

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may not have an attorney to act for him. It is urged, however, that supposing these attornies to have been attornies for the parties, the extent of their authority is not sufficiently alleged; the declaration containing no such expression as "thereunto duly authorised;"—but those words are not necessary in all cases; by the demurrer, it is admitted that these persons were attornies of the parties in the matter of the reference; and if they were attornies to refer, they had authority to choose an arbitrator. As to the argument that the infants cannot be bound,—what has been done is not void with respect to them, but only voidable; and the supposed hardship of the infant's having an election unfairly to rescind the award does not exist, because at the time of the submission, all the parties knew they were dealing with infants.

It is not necessary for us to decide whether or not attornies in a cause have authority to refer matters out of it, for it seems clear that these persons were attornies for the parties generally; and for aught that appears to the contrary, they may have been specially authorised for this purpose. If they were specially authorised, although their authority would be revoked by the death of their principal, yet acts done before his death, might affect his personal estate after.

Another objection which has been urged, is, that as all the parties referred differences in which they were mutually concerned, the arbitrator could not decide any question separately. But it does not appear that he has decided on any separate concerns, and he has authority to make one or more awards, in which he may include distributively the several matters referred. Even if this were a distinct claim, the arbitrator might make a distinct award, according to *Athelston v. Moon* (a), in which the arbitrator was to award on all matters that either

(a) *Co. Rep.* 547.

might

might have against the other. It has, however, been urged here, that the arbitrator cannot decide on all matters, because some of the parties are infants; and that if he cannot decide on all, his award is not final for any. But the old law is clear, that if the reference be general, without any express stipulation that the arbitrator shall decide on all the matters referred to him, the award may be good for part; and this law has not been altered; for the case of *Mitchell v. Stavelly* contained an express stipulation that the arbitrator should decide on all the premises; Lord *Ellenborough* says, "It was a condition of the submission that they were to award upon all matters in difference between the parties." No such words are contained in the present submission, and they were probably designedly omitted, because the arbitrator might have found it impossible to decide between all the parties at once, and he is expressly empowered to make more awards than one.

The last objection is, that the authority to the arbitrator has been revoked. I have felt some difficulty about this, because it has been urged, that if such an authority be not revoked by death, a man might place his executor or his administrator (perhaps a creditor) in an awkward situation. But if he chooses to place them in such a situation, the convenience or inconvenience of his own act cannot be discussed here. In the present case he has said, in effect, "the arbitrator shall go on notwithstanding my death;" if any inconvenience ensue, he has brought it himself on his representative, who may elect whether or not he will accept the office. It has been said, indeed, that this is no more than a covenant not to revoke the authority by any act of the party covenanting; that death will operate as a revocation independently of any such covenant; and that the covenant does not abridge the covenantor's power to revoke, but only gives an action against him, in case he violates his

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covenant. But the engagement is, not that the party will not revoke, but that death shall not abate the arbitration. It has been asked, whether an agreement that a suit shall not abate by death, would enable a court to proceed with the cause; it is not necessary to decide that; for though an agreement of the parties may not give a court jurisdiction, that doctrine does not apply to a domestic forum erected by the parties themselves. We cannot doubt that justice has been done in the present case; the objections which have been raised are merely formal; and our judgment must be for the Plaintiff.

PARK J. expressed his concurrence.

BURROUGH J. We must presume that the order of reference given by the Vice-Chancellor was regularly made by the Court, and the interests of the infants must have been in the hands of their guardians. There is nothing in the award contrary to the interest of those infants, and the arbitrator's authority was not revoked by the death of *Biddell*. The law touching revocation, does not apply to this case, which is not the case of a simple authority, but one in which the party expressly binds his effects to the result of the award, and the action is brought against the Defendants, only in their representative capacity. Besides, the reference was in an equity suit, in which every person is joined who has the remotest interest in the matters in dispute, and the arbitrator has an equitable jurisdiction, which he does not possess in a reference at law: if this were an award at law, there might perhaps be objections to it, which cannot now be raised; our judgment must be *de bonis testatoris*.

GASELEE J. As to the objection that there is no averment of the defendants having assets, it is expressly decided

decided in the case of *Powell v. Graham* that such an averment is not necessary, under circumstances like the present; and as to the supposed defect of consideration, here is an express promise by the testator, that the award shall go on. An action might have been brought on that promise, but it has been brought on the promise of the executor, who became liable on the engagement of his testator. If he had had no notice of the award, he might have made the objection; but, on the contrary, knowing the award to have been executed, he makes the promise which is the subject of the present action.

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Judgment for the Plaintiff.

Sir JOHN TYRRELL v. MARSH.

May 3.

ASSUMPSIT for the purchase money of an estate called *Collier's Hatch*, in *Essex*, which the Defendant had purchased of the Plaintiff. At the trial before *Graham B.* at the last *Lent* assizes for that county, a verdict was found for the Plaintiff, subject to the opinion of this Court on a case which stated, in substance, that by a marriage settlement of *May 1775*, the estate in question By a marriage settlement, an estate was limited to the use of husband and wife for life, with remainders over to the children of the marriage, and in default of issue, to the right heirs of husband and wife. There was a power in husband and wife to charge the estate during their lives, and a power to certain trustees, in whom the legal estate was vested, to sell on the direction of the husband and wife or the survivor.

The husband and wife borrowed money by way of annuity; created a term of 1000 years, and levied a fine to *G.* in fee, which, by a deed to lead the uses, was declared to be "in trust to secure the regular payment of the annuity, and to corroborate the said term:"

Held, that this fine did not extinguish the trustees' power to sell under a direction as above.

(subject

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(subject to a charge of 1500*l.* secured by a term of 1000 years) was limited to the use of *Francis Stuart* and his assigns for life, *sans waste*, (with a limitation to *William Tod* and *Thomas Cheap* and their heirs during his life, in trust to support contingent remainders,) remainder to the use of *Mary Stuart* and her assigns for life *sans waste*, with a limitation to the said trustees and their heirs during her life, in trust to support contingent remainders, remainder to the children of the marriage, in such shares as *Francis Stuart* and *Mary* his wife should by deed or will appoint, and for default of such appointment,

To the use of the children of the marriage as tenants in common in tail with cross remainders, and for default of such issue, to the use of such person as *Mary Stuart*, notwithstanding her coverture, should by deed, attested by two witnesses, or by will appoint, and for default of such appointment,

To the use of the right heirs of the survivor of *Francis* and *Mary Stuart* for ever.

And it was provided that *Francis* and *Mary Stuart* during their joint lives, or the life of the survivor, might charge the estate to the extent of 2000*l.*

And it was further provided that it should be lawful for the said *William Tod* and *Thomas Cheap*, and the survivor of them, and the heirs of such survivor, at any time or times during the joint lives of the said *Francis Stuart* and *Mary* his wife, or during the life of the survivor of them, by the direction and with the approbation of the said *Francis Stuart* and *Mary* his wife, or of the survivor of them, to be testified by any writing or writings under their or either of their hands and seals to be attested by two or more credible witnesses, to make sale of or to convey in exchange, as therein mentioned, all, or any part or parts of the messuages, farms, lands, tenements, or hereditaments, which were thereby limited

limited to strict uses as aforesaid, with their appurtenances to any person or persons, whomsoever, for any such price or prices in money, or for such other equivalent in lands and hereditaments, as to the said *William Tod* and *Thomas Cheap*, or to the survivor of them, and his heirs as aforesaid, should seem reasonable; with full power, upon payment of the money which should arise by any such sale of the said premises, or of any part or parts thereof, to give and sign proper receipts for the same, which receipts should be a sufficient discharge to purchasers.

Francis Stuart and *Mary* his wife, had one child, a daughter; *Mary Stuart* survived her husband, and afterwards married *James Stuart*.

By a term of 1000 years created in *March* 1782, *Mary Stuart* with the consent of her husband charged the estate with 2000*l.*, borrowed of *Alexander Wood*, to whom the term was granted as a security.

By an indorsement on the back of this deed, and bearing date *April* 1783, *Wood* assigned this term to *Elizabeth Gordon*, of whom *Stuart* and his wife had then borrowed 2000*l.*

And by indentures of lease and release of the same date, to which, among other persons, *Stuart* and his wife, *Elizabeth Gordon* and *James Graham* were parties, (stating that 1000*l.* only, and not 2000*l.*, had been paid by *Elizabeth Gordon*, and that she had paid it in purchase of an annuity of 95*l.*, to be paid by *Stuart* and his wife,

And reciting that *Mary Stuart* was entitled to the reversion of the premises expectant on the death of her daughter under age and without issue; and that for better securing the annuity to *Elizabeth Gordon*, *Stuart* and his wife had agreed to grant this reversion to *Graham* and his heirs, in trust for *Elizabeth Gordon* and her assigns,)

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The premises were conveyed to *Graham* in fee, subject to the estate of *Mary Stuart's* daughter therein, and to the original charge of 1500*l.*, upon trust for *Elizabeth Gordon* and her assigns, to secure the regular payment of the annuity :

And *Stuart* and his wife covenanted to levy a fine of the premises to the use of *Graham* in fee, for corroborating and strengthening the said term, and subject thereto to *Graham* and his heirs, upon the trust before mentioned.

Stuart and his wife duly levied a fine *sur conuzance de droit, &c.* to *Graham*, as of *Easter* term in the 23 G. 3., of the premises in question, in pursuance of the said covenant.

In 1793, by indentures of lease and release (attested by two witnesses), to which *Tod* and *Cheap*, *Elizabeth Gordon*, *Graham*, *Stuart* and his wife, and various other persons, who had joined in executing the before-mentioned indentures, were parties,

Reciting the indentures of 1775, 1782, and 1783, and the fine levied in pursuance thereof,

It was witnessed, that in consideration of 3670*l.* paid by Sir *W. Smyth*, and by virtue and in execution of the power reserved to *Mrs. Stuart* by the indentures of 1775, but subject and without prejudice to the aforesaid power of sale and conveyance limited to *Tod* and *Cheap*, and the exercise thereof, and the uses thereby created, *Mrs. Stuart* directed and appointed, that if her daughter should die without leaving issue of her body, then after her daughter's decease and such failure of issue, the premises should remain, and the indenture of 1775, should operate to the uses thereafter limited; and *Mrs. Stuart* then directed *Tod* and *Cheap* to sell and convey the premises to the uses thereafter limited, and to exercise

cise the power of sale given them by the deed of 1775, and the fine levied in pursuance thereof. And *Tod* and *Cheap* did thereby sell and convey the premises to the uses thereinafter limited, and *Stuart* and his wife, *Tod* and *Cheap*, and *Graham*, with the consent of *Elizabeth Gordon*, according to their respective interests, granted, bargained, sold, assigned, released, and confirmed the premises in question to Sir *W. Smyth* and his heirs, to hold to the several uses thereinafter mentioned, which were such as Sir *W. Smyth* should appoint, &c. with the usual trusts to bar dower, and for default of appointment, to the heirs and assigns of Sir *W. Smyth*, to whom *Elizabeth Gordon* also assigned the residue of her term of 1000 years, and remitted the annuity of 95*l.* .

Sir *W. Smyth* devised the premises to the Plaintiff and another, in fee, in trust to sell, and died in *May* 1823.

Shortly afterwards the Plaintiff contracted to sell the premises to the Defendant.

The question for the opinion of the Court was, whether the fine levied by *James Stuart*, and *Mary* his wife, in or as of *Easter* term 23 G. 3., operated to extinguish or destroy the right or power of the said *Mary Stuart*, to consent to a sale of the settled estates under the power for that purpose contained in the said indenture of the 27th day of *May* 1775, so as to prevent an exercise of such power of sale by the trustees of the same indenture; and if the Court should be of opinion that the said fine did not so operate, then the verdict found for the Plaintiff was to stand; but if the Court should be of opinion that the said fine did so operate, a verdict was to be entered for the Defendant.

Bosanquet, Serjt., for the Plaintiff, relied on Lord *Jersey v. Deane* (a), to shew that the power in *Tod* and

(a) 5 B. & A. 569.

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Cheap was not destroyed by the fine of 1783. That fine was levied, and the deed to lead the uses executed for specific purposes, and could not have an effect contrary to the intention of the parties, which was only to secure the annuity to *Elizabeth Gordon*, without affecting the trustees' power to convey. They were not the conusors, but *Stuart* and his wife alone.

Taddy Serjt., contra. It is true that a fine which unexplained will have the effect of destroying powers, and divesting estates, may be controlled by the agreement of the parties, and the court will so modify it as to further that intent: *Herring v. Brown.* (a) But in the deed to lead the uses of the present fine, no intent is expressed to preserve the power of the trustees, and to do so is rather inconsistent with the purpose of the conusors: it is not material that the trustees were not conusors to the fine, for their power was not one which they could exercise at their own pleasure or for their own benefit, but only in conjunction with *Stuart* and his wife, who were to put the power in motion. The power, therefore, was extinguished, unless an intention to preserve it can be collected from the deed to lead the uses of the fine. The object of the fine was to convey a fee to *Graham* and his heirs, with a view to secure the annuity to *Elizabeth Gordon*: the resulting trusts, if any, to *Mrs. Stuart*, cannot be looked at in a court of law; and in the deed to lead the uses, nothing is said about preserving the power, which distinguishes this case from that of *Lord Jersey v. Deane*, where the intention to preserve the power appeared in the declaration that the fine was to operate first for corroborating the uses in the antecedent settlement. But here the intention to give *Gra-*

(a) *Cartb.* 22.

nam a fee might have been entirely frustrated if this power remained in the trustees, for they might then have exercised it on the direction of the conusors, notwithstanding the conveyance to him. It may be said the conusors intention was only to secure the annuity, but if they chose to carry that into effect by conveying a fee to *Graham* in such a manner as to destroy the power, their intention must be pursued, however injudicious it may appear; and a fine uncontrolled by the expression of an intention to control it, has the effect of extinguishing all powers. *Herring v. Brown*, *Digges's case (a)*, *Albany's case (b)*, *West v. Berney (c)*, *Smith v. D'Aeth. (d)*

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BEST C. J. This action was brought to recover damages for a breach of contract, by the Defendant, in not purchasing an estate to which the Plaintiff contends he has a good title; and that depends on the question whether or not the right to sell the estate has been destroyed by any act of *Mary Stuart* and her husband.

By the deed of 1775 a power of sale was given to certain persons, which could only be executed under the direction of *Mary Stuart*; but subject to this power, *Mary Stuart* and her husband had borrowed money of *Elizabeth Gordon* by way of annuity, to secure which a fine was levied, according to a deed drawn up to lead the uses. We need not now consider what would be the effect of a fine without any deed to declare the uses; what has been laid down on the subject in the first volume of Lord *Coke's Reports* is not disputed on the present occasion; namely, that where there is no deed, a fine "thoroughly ransacks the estate." But here there is a deed, and we need not take up the law earlier than

(a) 1 Rep. 173.

(b) *Ibid.* 110.

(c) *Sugd. on Powers*, 80. ed. 1821

(d) *Ibid.*

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the case of *Herring v. Brown*. The decision of that case in the Exchequer chamber, upon which we shall now act, is consistent with justice, and has been confirmed by subsequent decisions; as by that of *Doe d. Odiarne v. Whitehead*. (a) The principle laid down in that case is, that though the levying of a fine displaces existing interests, yet that where an accompanying deed shews with what object it was levied, the fine shall not destroy powers which it was the intention of the parties to retain. The intention of the parties in levying this fine was to secure the payment of an annuity to *Elizabeth Gordon*, and nothing else: the fee was not conveyed to *Graham* as a separate and independent estate, but merely to secure the annuity; it was only to exist during the life of *Elizabeth Gordon*, and on her death was to return to the *Stuarts*. It has been urged that a court of law cannot take notice of a resulting trust. But upon the death of *Elizabeth Gordon*, the estate would be at once in *Mrs. Stuart* again, under the operation of the Statute of Uses, and recourse to a court of equity would not be necessary. An attempt has been made to distinguish this case from that of *Lord Jersey v. Deane*, because there the object of the parties was expressly stated in the deed; but it is equally clear here, upon the whole of the instruments taken together, that the intention of the parties was to limit the operation of the fine, and prevent the destruction of the power.

PARK J. The only difficulty here has arisen from the number and length of the deeds; but when the deed of 1783 is considered, there is no room for doubt. It is clear from all the cases that the intentions of the parties must govern the operation of a fine, which if it be uncontrolled, will certainly effect the destruction of

(a) 2 Burr. 704.

powers ; but it may always be controlled, where the intention of the parties to that effect can be collected; according to the case of *Herring v. Brown* confirmed in *Doe d. Odiarne v. Whitehead*. In the present instance the parties had no purpose but to secure the annuity, which was the express object of the conveyance to *Graham*. And when the trust in favour of *Elizabeth Gordon* was executed, the property was to be again at the disposition of *Mrs. Stuart*.

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BURROUGH J. Every fine acknowledges the land comprised in it to be the land of the conusee, so that a power annexed is gone, if there be no deed to declare or lead the uses ; but if there be such a deed, it is the same thing as if it were inserted in the fine: the two constitute one conveyance ; must receive one construction, and transfer a unity of interest. Even when the deed has been executed at a different time, the courts have gone a long way to make the fine subservient to it ; and we cannot now say that the fine, in this case, shall operate one way, and the deed to lead the uses another.

GASELEE J. concurred.

Judgment for the Plaintiff.

DORVILLE v. WHOOMWELL.

May 3.

IN this case a bailable *capias* was issued into *Middlesex* grounded on an affidavit of debt, sworn before the deputy-filacer for *Middlesex*, and filed in the filacer's office.

Where a first *capias* is issued on an affidavit of debt filed with the filacer of one county,

if, instead of a *testatum*, a second *capias* is issued into another county, a new affidavit of debt must be filed with the filacer of the second county.

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On this writ the defendant was not arrested. The Plaintiff, then, instead of suing out a *testatum capias* into *Yorkshire*, in which county the Defendant resided, obtained an office-copy of the affidavit of debt, certified by the filacer for *Middlesex*, lodged it with the filacer for *Yorkshire*, and thereupon issued a *capias* into *Yorkshire*.

Bosanquet Serjt., on the authority of *Anderson v. Hayman* (a), and *Dalton v. Barnes* (b), obtained a rule *nisi* for delivering up the bail-bond to be cancelled, and for discharging the defendant on his entering a common appearance, on the ground that the Plaintiff was irregular in not filing a new affidavit of debt, with the filacer for *Yorkshire*.

Vaughan Serjt., who shewed cause, cited *Boyd v. Durand*. (c)

But that case was distinguished, the filacer for the two different counties having been the same person ;

And the Court saying that the decision in *Hayman v. Anderson* was founded on good sense,

Made the rule absolute.

(a) 2 *B. Moore*, 192. (b) 1 *M. & S.* 230. (c) 2 *Taunt.* 161.

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NORRIS and Others v. POATE.

May 3.

THIS was an action of *assumpsit* upon the common money counts. The Defendant pleaded the general issue; and upon the trial before *Abbot C. J.*, *Hampshire Summer assizes 1824*, a verdict was found for the Plaintiffs with 20*l.* damages, subject to the opinion of the Court upon the following case:

By an act of parliament passed in the 12th year of the reign of *Geo. 3.*, intituled "An act for repairing and widening the roads from *Sheet Bridge to Portsmouth*, and from *Petersfield to the Alton* turnpike road near *Ropley*, in the county of *Southampton*," trustees were appointed for the purposes of the act, with power to erect turnpikes upon the said roads; and it was thereby enacted, as to the tolls, as follows: "The respective tolls following shall be demanded and taken of the *person or persons attending any cattle or carriage* hereinafter mentioned, at every turnpike, by such person as shall be appointed for that purpose, before any cattle or carriage shall be permitted to pass through the same; that is to say, *For every horse, mare, gelding, mule, or ass, drawing any coach*, or other pleasure-carriage, the sum of three-pence, but if drawing any stage coach or machine, the sum of sixpence; for every waggon, wain, cart, or other carriage, drawn by four horses, oxen, or other beasts of draught, the sum of one shilling, and drawn by three horses, oxen, or other beasts of draught, the sum of nine-pence, and drawn by two horses, oxen,

By the enacting clause of a turnpike act it was provided that there should be taken of every person attending any cattle or carriage, for every horse drawing any stage coach, the sum of 6*d.*

By an exempting clause it was added, "that if any person should have paid the toll for passing, the same person, upon producing a ticket, should be permitted to re-pass free with the same cattle or carriage:"

Held, that the toll having been paid by the coachman on passing, for horses drawing a stage coach, a second toll could not be demanded for the same horses re-passing, though with a different coach and different coachmen, but belonging to the same proprietor.

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or other beasts of draught, the sum of sixpence, and drawn by one horse, ox, or other beast of draught, the sum of three-pence." And it was further enacted by the said act, "that if any *person or persons* shall have paid the tolls by this act granted and ascertained for the passing of any cattle or carriage through any turnpike erected by virtue of this act, *the same person or persons*, upon producing a note or ticket of the day, denoting such payment, shall be permitted to pass and repass through the same gate or turnpike, *with the same cattle or carriage*, toll free, at any time or times during the same day, to be computed from twelve of the clock in one night to twelve of the clock in the next night; which said note or ticket the collectors or receivers of the said tolls are hereby required to give gratis, if demanded, on payment of such toll."

The said act of parliament was continued by another act passed in the 36th year of the reign of His late Majesty for that purpose, and again for the term of twenty-one years, by another act passed in the 2d year of the reign of his present majesty.

The Defendant on the 6th *July* 1821, and from thence during the whole of the year 1822, was a toll collector at, and keeper of, one of the turnpike gates erected upon the road from *Sheet Bridge* to *Portsmouth*, by virtue of the said acts.

The plaintiffs during the same time were the proprietors of two stage coaches, each called the *Hero*, which travelled, daily, between *Portsmouth* and *London*, and *London* and *Portsmouth*, along the said road. The coach which left *Portsmouth* in the morning, on its way to *London*, was drawn by four horses through the gate kept by the Defendant to a place about two miles distant from the same, where the horses remained until the arrival of the coach which left *London* the same morning, on its way to *Portsmouth*, and then that last-mentioned coach,

coach, with different passengers and parcels, was drawn by the same four horses in the evening of the same day through the same gate to *Portsmouth*. In the morning the coachman who drove the coach from *Portsmouth* to *London* paid the proper toll of sixpence for each of the said horses, and received a note or ticket of the day denoting such payment, and in the evening of the same day the other coachman, who drove the coach from *London* to *Portsmouth* drawn on its return by the same horses as aforesaid, produced the said note or ticket of the day to the said Defendant at the said gate; but the said Defendant always demanded a further toll of 2s., at the rate of sixpence for each of the horses drawing the said last-mentioned coach; and the last-mentioned coachman was obliged to pay the same to the said Defendant, in order that the horses and last-mentioned coach might be permitted, by him, to pass through the said gate. The coaches and the horses belonged to the Plaintiffs, and the coachmen were their servants, but the coachman who drove the horses in the evening was not the coachman who drove them in the morning. The money paid in the evening, as aforesaid, was paid by the coachman as the servant, and on the account of the said Plaintiffs, and amounted in the whole to the sum of 19l. 16s.

On two days, namely, on the 11th and 15th *June* 1822, *William Norris*, one of the Plaintiffs, who was well known to the Defendant to be one of the proprietors of the coaches and horses as aforesaid, went with the coach and horses from *Portsmouth* in the morning, through the gate, and paid the toll of sixpence for each horse each of the said mornings, and received the notes or tickets of the day denoting such payments, and returned with the coach from *London*, and the same four horses to the gate in the evening of each of those days, and produced the said respective notes or tickets of the day

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to the Defendant; but the Defendant, on each occasion, demanded of the Plaintiff the further toll of sixpence for each of the horses, and Plaintiff was obliged to pay the same, and did pay the Defendant the sum of 2s., on each of those evenings, in order that the horses and coach might be permitted, by him, to pass through the said gate. On these two last-mentioned days, *William Norris*, (the Plaintiff) went and returned with the coaches on the business of the respective journies of the coaches on those days, but did not drive either the coach from *Portsmouth to London*, or from *London to Portsmouth*, the coaches being driven, as usual, by their respective coachmen, his servants as aforesaid.

The question for the opinion of the Court was, whether the said sum of 19*l.* 16*s.* and the said two last-mentioned sums of 2*s.* were legally payable for toll. If the Court should be of opinion that both the said sums were legally payable for toll, a verdict was to be entered for the Defendant. But if the Court should be of opinion that the said sum of 19*l.* 16*s.* was not legally payable for toll, the verdict for the Plaintiffs was to stand, and the Defendant was to account for all the sums received by him for toll, on the return of the same horses through the gate from the 10th *July* 1821 up to the time of signing judgment; and if the Court should be of opinion that the sum of 19*l.* 16*s.* was legally payable, but that the said two sums of 2*s.* were not legally payable for toll, then the verdict was to stand for the Plaintiffs, but the damages were to be reduced to the sum of 4*s.*

Wilde Serjt., for the Plaintiffs, contended that, by this statute, the toll was imposed on the horses, and referred to *Gray v. Shilling (a)*, when the Court called on

(a) 2 B. & B. 31.

Pell Serjt., for the Defendant: he argued that the toll was imposed on the carriage, and that the enumeration of the horses was only a means by which to measure the amount of the toll for each carriage. He relied on the 9th section, under which the tolls were to be paid by the *person attending any cattle or carriage*, and the language of the exempting clause, "if any *person* shall have paid, the same *person* shall be permitted to pass on producing a ticket;" and contended that a different coachman could not be called the same person, though he was servant to the same master and payment by a servant had been holden as payment by the master; *Williams v. Sangar*. (a) But the words of the act, in that case, as in the case of *Gray v. Shilling*, differed from those of the present, which were clear, and, therefore, imperative, even though the consequences should be such as might not have been anticipated when the act passed: *Harrison v. Brough*. (b) If the toll was on the carriage, the attendance even of the master himself, going and returning, could not entitle him to recover: *Loaring v. Stone*. (c)

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BEST C. J. It has often been declared from the bench in *Westminster Hall*, that they who seek to exact tolls through the medium of the legislature must speak plain language: the toll receivers are before those who pass the act, but not the toll payers, and it is incumbent on the Courts to take care of the interests of the payers.

However, I thought this act perfectly clear, and that the only question to be raised was, whether in order to claim the exemption, the hand that paid the toll in returning ought to be the same as the hand that paid it in going. About that there could be no doubt; for in both cases, though it is the coachman who offers the money, it is the master who pays; the money is his; he alone is entitled to recover for money had and received,

(a) 10 East, 66.

(b) 6 T. R. 706.

(c) 2 B. & C. 515.

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where it has been wrongfully paid; and he is so far, constructively present, as to be answerable for any negligence on the part of the coachman. It has been argued, however, that by this act of parliament the toll is imposed on the coach, and not on the horses. I think it is imposed on the horses; and if we wanted authority, we should have it in the last case which has been cited, for the words of the act, there, were the same as here, and the toll was holden to be on the horses, though the judgment turned on an expression which is not to be found in the act now before the Court, namely, that the exemption on returning should exist only in cases where the same horses *and* coach returned. In the act before the Court, the exemption is for the same person returning with the same cattle *or* carriage. The enacting clause of the present act gives "for every horse, &c. drawing any stage coach, the sum of sixpence;" and that the intention of the legislature was, on the passing of a carriage, to levy the toll for the horse, is plain from the distinction made with respect to wains, &c., where the toll is expressly imposed on the vehicle. If there were no preceding case, the present would be clear on the language of the act; but the point has been decided in *Gray v. Shilling*.

PARK J. Under the language of this act the tax is not imposed on the vehicle but on the horse, where the vehicle passing is a pleasure carriage, or a stage coach. The case of *Brough v. Harrison* was decided with a view to prevent a fraud, and in *Loaring v. Stone* the judgment of the Court turned on the conjunctive *and*, in the exempting clause of the act: here the expression is, that the party who has paid shall be permitted to pass and repass with the same cattle *or* carriage, toll free.

BURROUGH J. It was only intended that a party should pay once in the same day for the same horses.

It

It is perfectly plain that the toll is imposed on the horses, and as to the person attending, the coachmen are employed by the same proprietor, and the proprietor is always attending, and responsible in the person of his coachman.

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GASELEE J. concurred; adding, that he had formerly given an opinion to the same effect on the same trust.

Judgment for the Plaintiff.

MARY PULLIN, Wife of S. PULLIN, by T. BARNES,
her next Friend, and Others, v. SAMUEL PULLIN,
PEARSALL, and ANDREWS.

May 6.

THE following case was sent from the Court of Chancery for the opinion of the Court of Common Pleas: *Samuel Pullin* the elder, formerly of *Islington*, in the county of *Middlesex* (now deceased), was at the respective times of making his will hereinafter mentioned, and at his death, seised in fee-simple of certain freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the parish of *St. Mary, Islington*; and he was also, at the respective times aforesaid, seised to him and his heirs, according to the custom of the manor of the prebendary of *Islington*, of certain copyhold or customary lands and hereditaments within and holden of the said manor, which were also situate in the said parish of *St. Mary, Islington*, the whole of which said freehold and copyhold messuages, lands, tenements, and copyhold estates he gave to *S. P.*

By a will reciting that the devisor was seised of divers freehold and certain copyhold estates in *I.*, under mortgage for a certain sum to *R.*, devisor gave all his said freeholds and copyholds to *P.* and *A.* in trust for certain purposes; the residue of his freehold, leasehold, and copyhold estates he gave to *S. P.* also seised of twenty-one acres in *I.*, not under mortgage, and of various leaseholds;

Held; that the twenty-one acres passed to *S. P.* under the residuary clause.

and

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and hereditaments, were at the respective times aforesaid subject to a mortgage thereof made by him the said *Samuel Pullin* the elder, to *Samuel Rhodes* of *Islington* aforesaid, Esq., by indentures of lease and release, bearing date respectively the 27th and 28th days of *March* 1812, and by a conditional surrender of the said copyhold lands and hereditaments, for securing to the said *Samuel Rhodes*, his executors, administrators, and assigns, the re-transfer into his and their name or names of the sum of 10,125*l.* 16*s.* 6*d.* 3 *per cent.* consolidated bank annuities; and also the payment until such re-transfer of such sum or sums of money as he the said *Samuel Rhodes* would have been entitled to receive as and for the dividends of the said sum of 10,125*l.* 16*s.* 6*d.* 3 *per cent.* consolidated bank annuities, if the same had remained standing in his name.

The said *Samuel Pullin* the elder was also, at the respective times aforesaid, seised in fee-simple of certain other freehold lands and hereditaments, containing twenty-one acres or thereabouts, also situate in the said parish of *St. Mary, Islington*, but lying separate from and unconnected with the other freehold and copyhold messuage, lands, tenements, and hereditaments, which were comprised in the said mortgage to the said *Samuel Rhodes*, as hereinbefore mentioned, and held under a title distinct and separate from the title to the other freehold and copyhold messuages, lands, tenements, and hereditaments: and the said freehold lands and hereditaments hereinbefore mentioned to contain twenty-one acres or thereabouts, were not at the respective times aforesaid, or at any time, subject to or comprised in the said mortgage to *Samuel Rhodes*, but the same were at the respective times aforesaid subject to a mortgage thereof made by the said *Samuel Pullin* the elder to *Sarah Pritchard*, by indentures of lease and
release,

release, bearing date respectively the 1st and 2d days of *January* 1798.

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The said *Samuel Pullin* the elder was also, at the respective times aforesaid, possessed of certain leasehold closes of land situate in the said parish of *St. Mary, Islington*; and also of a considerable leasehold estate in the parishes of *St. James* and *St. John, Clerkenwell*, in the county of *Middlesex*; and he was also, at the respective times aforesaid, seised of certain copyhold messuages and hereditaments situate at *Edgeware*, in the county of *Middlesex*; but he was not seised of or entitled to any other freehold messuages, lands, tenements, or hereditaments, either in the parish of *St. Mary, Islington*, or elsewhere.

The said *Samuel Pullin* the elder, being so seised and possessed as aforesaid, duly made and published his last will and testament in writing, bearing date the 12th day of *November* 1814, which was duly executed and attested in the manner required by law for devising freehold estates; and thereby, after giving a few small pecuniary legacies, and among others, to *Benjamin Pearsall* and *William Andrews* the sum of 105*l.* each, the said testator devised as follows: "And whereas I am seised in fee simple or otherwise entitled unto the inheritance of and in *divers* freehold messuages, lands, tenements, and hereditaments, situate within the parish of *St. Mary, Islington*, in the county of *Middlesex* aforesaid; and am also seised to me and my heirs, according to the custom of the manor of the prebendary of *Islington*, otherwise *Isledon*, in the county of *Middlesex*, of *certain* copyhold or customary lands and hereditaments, within and held of the said manor (which copyhold or customary lands and hereditaments I have duly surrendered or intend to surrender to the use of this my last will); and *all which freehold and copyhold messuages, lands, and hereditaments, are subject to a mortgage thereof*, made by me to

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Samuel Rhodes, of Islington, aforesaid, Esq. for securing to him the retransfer of the sum of 10,125l. 6s. 6d. 3 per cent. consolidated bank annuities, lent me by him; and also for securing to him the payment, until such retransfer, of such sum or sums of money as he would have been entitled to receive for dividends on the said stock, if the same had remained standing in his own name; now I do hereby give and devise all and every my said freehold and copyhold or customary messuages, lands, and hereditaments, with their appurtenances, unto the said Benjamin Pearsall and William Andrews, and their heirs, to the use of them and their heirs, nevertheless, upon the trusts, for the intents and purposes, and with, under, and subject to the powers and provisos hereinafter declared and contained of and concerning the same."

The testator then proceeded by his will to declare the trusts of the said devise, which were for the benefit of his natural son, *Samuel Pullin the younger*, and of *Mary Pullin*, then and now the wife of *Samuel Pullin the younger*, and of any future wife of *Samuel Pullin the younger*, and of the child or children, grandchild or grandchildren, or other issue of *Samuel Pullin the younger*, in the manner therein mentioned, with benefit of survivorship among the children of *Samuel Pullin the younger*; and in default of issue of *Samuel Pullin the younger*, for the benefit of the appointees of *Samuel Pullin the younger*; and in default of such appointment, for the benefit of the right heirs of the testator, with usual powers to the trustees, to apply the rents and profits of the said estates for the maintenance of any child or children of *Samuel Pullin the younger*, during their respective minorities; and the testator thereby also gave a power to *Samuel Pullin the younger* during his life, and after his decease to the trustees, to grant such building and other leases as therein mentioned; the will contained

contained the usual clauses for appointing new trustees, and for indemnity to the trustees; and the testator, after giving to his servant *Mary Johnson* during her life an annuity of 20*l.*, to be paid out of the *residuary personal estate*, proceeded as follows: "And all the rest, residue, and remainder of my freehold, copyhold, and leasehold estates, whatsoever and wheresoever, and of every nature and kind, with their respective appurtenances, and all my interest therein respectively, and also all my goods, chattels, and personal estate, whatsoever and wheresoever, I give, devise, and bequeath unto my said son *Samuel Pullin*, his heirs, executors, and administrators and assigns respectively, according to the respective natures and tenures thereof, to and for his and their absolute use and benefit. And I appoint him sole executor of this my will."

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The testator died in the month of *January* 1816, without having altered or revoked his will, and leaving the trustees, *Benjamin Pearsall* and *William Andrews*, and likewise his son *Samuel Pullin*, him surviving.

The question for the opinion of the Court was, whether the freehold lands and hereditaments hereinbefore mentioned as containing twenty-one acres or thereabouts, which were not comprised in the mortgage to *Samuel Rhodes*, passed by the devise to *Benjamin Pearsall* and *William Andrews* and their heirs; or whether the same passed by the residuary devise and bequest to *Samuel Pullin* the younger, his heirs, executors, administrators, and assigns.

Wilde Serjt. Under this devise the twenty-one acres passed to *Pearsall* and *Andrews*. The devisor gives them *all* the freehold and copyhold property, which the recital to the devise had described to be in *Islington*: the circumstance of the mortgage with which some of it was charged is a mere matter of description, and not

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of limitation; and where a thing has been sufficiently ascertained, the addition of some inaccurate particulars will not vitiate the devise, *Roe d. Conolly v. Vernon.* (a) This description, too, is not in the substantive part of the devise, but in the introductory recital, where he states himself as being seised of *divers* freehold messuages, whereas he had but one freehold under mortgage. There is nothing from which any conflicting intention can be collected but the residuary clause; but there is personal property to which that applies; and the insertion of the word freehold in that clause is only one of those sweeping expressions, which being frequently inserted in wills without any specific object, was holden in *Marshal v. Hopkins* (b) (where there was no personalty to which the residuary bequest could apply) to have no effect after a clear devise of the realty. It may be also inferred from the devisor's charging the annuity on the personalty, that he meant the whole of the realty to pass under the first devise.

Bosanquet Serjt., contra, relied on the minute accuracy with which the mortgage was described, as indicating clearly the devisor's intention to pass no more than that which he had specified as charged with such mortgage; and under those circumstances no stress could be laid on the word *all* in the commencement of the devise: *Gascoigne v. Barker* (c), *Wilson v. Mount.* (d) He also referred to, and distinguished in this respect, *Banks v. Denshaw* (e), there being in that case no doubt about the intention.

BEST C. J. We entertain no doubt on this case. In the construction of wills like the present, little assistance can be obtained from decisions on other wills, except in

(a) 5 East, 79.

(b) 15 East, 319.

(c) 3 Atk. 8.

(d) 3 Ves. 19.

(e) 3 Atk. 584.

certain principles that have occasionally been laid down ; and the ground on which we decide that the twenty-one acres in question passed under the residuary clause is, that looking at the whole of the will we find they cannot pass under any other. I agree with Lord *Ellenborough* in *Roe v. Vernon*, that where the previous devise is clear, the property ascertained by it will pass, though there be a subsequent misdescription ; but here the devisor has confined the extent of the *Islington* property he proposed to pass to that which was under mortgage to *Rhodes*, the particulars of which mortgage he has most minutely specified. As to his charging the annuity on his personal property, the object of that might be to facilitate the sale of the real property, pursuant to the trusts of the will, in case an occasion for selling it should subsequently arise.

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The following certificate was afterwards sent.

We have heard this case argued by counsel, and having considered the same, are of opinion that the said freehold lands and hereditaments in the case mentioned, as containing twenty-one acres or thereabouts, which were not comprised in the said mortgage to the said *Samuel Rhodes*, did not pass by the said devise to the said *Benjamin Pearsall* and *William Andrews*, and their heirs ; but that the same passed by the said residuary devise and bequest to the said *Samuel Pullin* the younger, his heirs, executors, administrators, and assigns.

W. D. BEST,
J. A. PARK,
J. BURROUGH,
S. GASELÉ.

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May 7.

COFFEE v. BRIAN.

J., T., and B. were jointly concerned in the sale of butters. *J.* consigned them to *B.*, who sold them on the joint account.

T., being requested to accept bills for the firm, refused to do so without some security, when *B.* engaged, if *T.* paid the bills, to repay him out of the proceeds received for butters already sold.

T. having accepted and paid the bills: Held, that he might sue *B.* for money had and received to his use.

THOMAS Coffee the Plaintiff, *John Coffee*, and *Brian* the Defendant, were jointly concerned in the *Irish* butter trade; *John Coffee* consigned the butters to *Brian* in *London*, who sold them, and *Thomas Coffee* accepted bills drawn by *John* to the amount of the butters sent. The profits of the various transactions were divided between the three parties.

Brian having received the proceeds from a certain quantity of this butter, *Thomas* expressed uneasiness at accepting bills in his own name without some security for the risk he incurred; when *Brian* engaged to provide for the bills at maturity, out of the proceeds already received.

Thomas Coffee having been obliged to pay the bills, now sued the Defendant for the amount in an action on the bills, and for money had and received, and in his declaration alleged the bills to be drawn on account of the Defendant and *John Coffee*.

At the trial before *Best C. J.* it turned out that the bills were drawn on the account of the Defendant, *John Coffee*, and the Plaintiff, and it was objected that this was a fatal variance; but *Best C. J.* thought, that, under the circumstances, the Plaintiff might recover on the count for money had and received.

A verdict having accordingly been found for him,

Pell Serjt. obtained a rule *nisi* to set it aside, and enter a nonsuit instead.

Vaughan

Vaughan Serjt., who shewed cause, relied on the count for money had and received; the bill transaction being a business separate from the partnership, and the money which the Plaintiff sought to recover having been put by and expressly appropriated to his use.

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Pell relied on the variance; and as to the count for money had and received, insisted, that the whole transaction was one partnership concern, and that, therefore, an action did not lie by one of the partners against his fellow, no balance having been struck, nor any agreement entered into to pay separately.

BEST C. J. I abstain from giving any opinion on the question of the variance, because it is clear that this action may be maintained on the count for money had and received. It has been objected that this is a partnership transaction, and no doubt the money came to the Defendant as the money of all three of the partners; but that has happened which divests them of the joint property in it, and vests it in the Plaintiff. The Defendant says, I have money in my hands, the produce of these butters, and if you will accept certain bills, I will hold the money on your account, in case of your being called on to pay the bills. When the bills were paid, therefore, the money in the Defendant's hands became separated from the partnership account; and where a contract is executed, as by the payment of these bills, a party may recover on the common counts, though it is necessary to resort to a special count where the contract is executory.

PARK J. It is not necessary to discuss the question of variance, for this action may be sustained on the count for money had and received. According to the

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case of *Foster v. Allanson* (a) a partner may sue for a balance due to him upon an account closed, and an agreement to pay the amount; and this is a case of the same description. The butters were consigned on the account of three, but it was necessary that one of them should accept bills, and *Thomas Coffee* refused to do this without some kind of security; upon which the Defendant agrees to appropriate for that purpose money already in his hands.

BURROUGH J. (b) That is the true construction of what has passed between these parties; but I think the Plaintiff could not have recovered on the special counts.

Rule discharged.

(a) 2 T.R. 479.

(b) *Gaselee J.* was absent at chambers.

May 7.

BAKER v. GARRATT and VENABLES.

In an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond cannot recover as special damage (beyond the penalty of the replevin bond) the expences of a fruitless action against the pledges, unless he gives the sheriff notice of his intention to sue them.

CASE against the sheriff for taking insufficient sureties in replevin.

The declaration stated, that the Plaintiff, as bailiff to one *John Blacket*, and by his command, in *August 1822*, distrained the goods of one *Henry Bowman*, in his house in *Clerkenwell*, for 25*l.* 17*s.* 4*d.* rent due from one *Elkanan W. Vidler*, in respect of the premises, by virtue of a demise of them to him from *Blacket*; that the Defendants, as sheriff of *Middlesex*, upon the complaint of

the expences of a fruitless action against the pledges, unless he gives the sheriff notice of his intention to sue them.

Bowman,

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Bowman, caused the same goods to be replevied and delivered to *Bowman*; that *Bowman* at the next county court appeared and levied his plaint against the Plaintiff for taking his goods, and then and there found pledges, as well for prosecuting his plaint as for returning the goods, if return should be adjudged, to wit, one *Josiah Harding* and one *William Adams*; that the plaint was afterwards, at the instance of the Plaintiff, removed by *re. fa. lo.* into the *King's Bench*, where *Bowman* was nonsuited, and a return of the goods was awarded to Plaintiff. That although it was the duty of the Defendants before making delivery of the distress to *Bowman*, in pursuance of the statute in such case made and provided, to take from *Bowman*, and two responsible persons, as sureties, a bond in double the value of the goods distrained, conditioned for prosecuting the suit of replevin with effect, and for returning them, if return should be adjudged; nevertheless, the Defendants intending to injure the said *John Blacket*, and to deprive him of the benefit of his distress, did not, before making deliverance of the goods, take a bond from *Bowman*, and two responsible persons, conditioned as aforesaid, but took in the name of the Defendants, as such sheriff as aforesaid, a bond, conditioned as aforesaid, from *Bowman*, *Harding*, and *Adams*, when *Harding* and *Adams*, at that time, and ever since, were, and are wholly insufficient for that purpose, and the goods were never returned to the Plaintiff, or *Blacket*, nor the arrears of rent paid, nor the judgment in replevin in any way satisfied. By means of which premises the Plaintiff was deprived of the goods, and of the benefit of the distress, and of the means of satisfying the arrears of rent and the costs and charges by him expended about his suit in that behalf, and about endeavouring to obtain a return of the goods; and was also obliged to lay out a large sum, to wit, 200*l.*, in endeavouring to compel *Harding* and *Adams*

to

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to pay him the value of the goods distrained. Plea, general issue.

At the trial before *Best C. J.*, *London* sittings after *Hilary* term last, it appeared, that *Bowman* having become bankrupt, the Plaintiff took an assignment of the replevin bond, upon which he issued a writ against *Bowman* and the two sureties; but being unable to serve *Bowman* or *Harding*, was compelled to proceed against *Adams* alone, against whom he obtained judgment, for damages and costs, 80*l.* 9*s.* 7*d.*, and issued a *fi. fa.*, to which there was a return of *nulla bona*. He afterwards obtained a judgment against *Harding*, for damages and costs, 82*l.* 5*s.* 7*d.*, and issued thereon a writ of *fi. fa.*, to which there was also a return of *nulla bona*.

It appeared, also, that both *Harding* and *Adams*, who were clearly insufficient, had in 1820 been discharged under the insolvent debtor's act, paying little or nothing to their creditors; that process had repeatedly issued against them, and that the sheriff's officer had given *Adams*, who had a previous acquaintance with *Bowman*, a guinea to become one of the sureties in the bond.

However, under the authority of the case of *Evans v. Brander (a)*, and the direction of the Chief Justice, a verdict was taken for only 52*l.* the amount of the penalty in the bond executed by the sureties, with leave for the Plaintiff, to move to increase the damages to the amount of the loss he had incurred in suing the sureties to no purpose.

Wilde Serjt. having accordingly obtained a rule *nisi* to that effect,

Vaughan Serjt., who shewed cause, relied on *Evans v. Brander*, and the 11 *Geo. 2. c. 19.*, which limits the

(a) 2 *H. Bl.* 547.

responsibility of the sureties to double the value of the goods distrained, and contended that the Plaintiff could not be placed in a better situation than if he had obtained sufficient pledges, who could have been called on to pay no more than the amount of the bond.

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Wilde, in support of his rule, admitted the principle laid down in *Evans v. Brander*, that the Plaintiff was entitled to no more in this action than he could have obtained against good sureties; but he contended that if the sureties had been good, the Plaintiff would have recovered from them the costs of his action against them, which he was, therefore, equally entitled to claim against the sheriff, if the sureties were insufficient to pay either debt or costs. He observed that *Evans v. Brander*, which confirmed the case of *Yea v. Lethbridge (a)*, was decided upon a compromise, and without argument, while *Concannon v. Lethbridge (b)*, which overruled *Yea v. Lethbridge*, was decided on solemn argument.

The Court here intimated that the sheriff ought to have received notice of the actions against the sureties.

To which it was answered, that the demanding an assignment of the replevin bond was an express notice that the assignee proposed to put it in suit, and the sheriff could not say that costs had been wantonly incurred by the assignee in suing sureties whom he knew to be insufficient, since the sheriff, by resisting this action and going down to trial, undertook to shew that they were sufficient.

BEST C. J. The case of *Evans v. Brander*, which has confirmed that of *Yea v. Lethbridge*, has decided, as a general principle, that in an action against the sheriff for

(a) 4 T. R. 433.

(b) 2 H. Bl. 36.

taking

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taking insufficient sureties, no more can be recovered against him than the party could have recovered against sufficient sureties. We think the case of *Evans v. Brander* rightly decided; but the question in that case arose on the subject of costs in the replevin, whereas in the present it arises on the subject of expences, which have been incurred in suing the insufficient sureties. Cases may occur in which the party injured may be entitled to recover such costs, but he is not entitled here, because he has given no notice to the sheriff that he intended to sue the pledges. Had the sheriff received such notice, he might have prevented the expence of the action, by paying all he was liable to pay under the sureties' bond. It has been said, that the assignment of the bond cannot but operate as such a notice; but this is not so, because the sureties might be solvent at the time of their executing the bond, and of the assignment, and might become insolvent before the assignee commenced his suit. In point of justice, the sheriff has a right to be furnished with an opportunity of preventing all the expence with which it is now sought to charge him. If a man becomes surety for a debtor, the creditor, in case the debtor fails, may recover the debt against the surety, but not the costs of a fruitless suit against the debtor, unless he gave notice of his intention to sue. The sheriff stands in the same situation, and has equally a right to notice: if there is any distinction, it is that the sheriff being a public officer, and often placed in situations of great difficulty, is entitled to more protection than an ordinary individual. He has received no notice in this case, and, therefore, the Plaintiff's rule must be discharged.

PARK J. The decision in *Evans v. Brander* is undoubtedly correct; but this case is distinguished, as the expences sought to be recovered are not the expences
 of

of the replevin, but of an action against the insufficient sureties. This is a serious question for the sheriff, and he is, at all events, entitled to notice of the action against the sureties, to enable him to pay the amount of the bond, if he thinks fit to do so.

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BURROUGH J. The sheriff ought to have had notice of the actions against the sureties, and the declaration against him ought to have averred it. He might perhaps have come in, and defended in the name of the sureties, or have paid the amount of the bond, but as he has had no such opportunity, this rule must be discharged.

GASELEE J. The want of notice prevents us from making this rule absolute. If the Plaintiff proceeds against the sureties without enquiry as to their ability to pay costs, and without notice to the sheriff, he must proceed at his own peril. Besides, it is not alleged in this declaration, that the sheriff took the sureties knowing them to be insufficient.

Rule discharged.

ELLIOTT v. HARDY.

May 11.

THIS was an action of replevin for taking two cows in a certain common called *Alnwick Moor* otherwise *Aydon Forest*.

In replevin, avowry was made in respect of a right of common

claimed by the corporation of *Alnwick* under a grant from the *De Vesci*.

The Plaintiff pleaded that the corporation had been accustomed to appoint a reasonable number of herds for, among other things, superintending the common and beasts on it, and also to appoint, for the pains of each herd, a reasonable and proper number of stints of each such herd, to be depastured upon the common :

Held, sufficient after verdict

The

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The taking was justified by *Hardy*, under the following avowry (among many others to the same effect:) "Because the town or borough of *Alnwick*, in the county of *Northumberland*, is and from time whereof the memory of man is not to the contrary, hath been an antient town or borough, in which there is, and for all the time aforesaid, whereof the memory of man is not to the contrary, hath been a body politic and corporate, known by divers names of incorporation, and amongst others, by the name of the burgesses of *Alnwick*; and the said town or borough is, and from the time whereof the memory of man is not to the contrary, hath been situated within a certain manor or barony called the manor or barony of *Alnwick*; and the said place in which, &c., is, and at the said time when, &c. was, and from time whereof the memory of man is not to the contrary, hath been a large tract of land, common, or waste ground, and the same lies within, and from time whereof the memory of man is not to the contrary, hath been, and is parcel of the said manor or barony, and *William de Vesci* being lord of the said manor or barony, and being seised of the said place in which, &c., in his demesne, as of fee, long before the time when, &c., to wit, in the reign of *Hen. 2.*, gave and granted, in and by his certain instrument in writing (the date whereof is unknown to the said Defendant), to the burgesses of the said town or barony of *Alnwick*, common of pasture in the said place, in which, &c.; and by subsequent grants of certain succeeding lords of the said manor or barony, the said grant of the said *William de Vesci* was confirmed by them to the said burgesses for ever; to wit, by a certain grant in writing, made long before the said time, when, &c., (the date whereof is unknown to the said Defendant,) of *William de Vesci*, son and heir of Lord *Eustace de Vesci*, and grandson of the first-named *William de Vesci*; and by a certain other grant, in writing, of *William de Vesci*, brother

brother and heir of *John de Vesci*, and son of the last named *William de Vesci*, bearing date long before the said time, when, &c., to wit, on the *Sunday* after the feast of *St. Michael*, in the year of our Lord 1290: and the said body corporate, ever since the making of the said first-mentioned grant, and at and long before the said time, when, &c., have had, and have used and been accustomed to have, and of right ought to have had, and still of right ought to have, by virtue of such grants for each of the several burgesses of the said town or borough of *Alnwick*, inhabiting therein, common of pasture in and upon the said place in which, &c. And the said Defendant in fact saith that long before the time when, &c., to wit, on the 24th day of *April*, in the year of our Lord 1823, &c., he became and continually from thence, and until, and at, and after the said time when, &c., was, and hath been, and still is one of the burgesses of the said town or borough of *Alnwick*, and at the said time when, &c., inhabited, and still doth inhabit therein, and was at and during all the time aforesaid, and still is, entitled to common of pasture, as aforesaid, in the said place in which, &c.: and because the said two cows, in the said declaration mentioned, were at the time when, &c., depasturing and destroying the grass then there growing and being, and doing damage to the said Defendant, so that he the said Defendant could not have and enjoy the aforesaid common of pasture there in so large and ample a manner as he then and there ought to have had and enjoyed the same, he well avows the taking of the said two cows in the said place, in which, &c., and justly, &c., as and for a distress for the said damage, so by them there done and doing, as aforesaid; and this he the said Defendant is ready to verify; wherefore he prays judgment, and a return of the said cattle, together with his damages, &c., according to the form of the statute

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statute in such case made and provided to be adjudged to him," &c.

To this avowry the Plaintiff pleaded, among other pleas, the following: That from time whereof the memory of man is not to the contrary, hitherto, the said body politic and corporate, in the said avowry mentioned, hath consisted of, amongst other persons, divers, to wit, four chamberlains, and twenty-four common councilmen, being burgesses of the said town or borough, in the said avowry mentioned; and from time whereof the memory of man is not to the contrary, hitherto, such common councilmen, and chamberlains, or the greater part of them, being in common council assembled, have appointed, and have been used and accustomed to appoint, and of right ought to have appointed, and still of right ought to appoint, *a reasonable and proper* number of herds, for (*amongst other things*) the herding, tending, and taking care of the cattle put upon the said place in which, &c., under, and by virtue, and in the exercise of such right of common, as in the said avowry is mentioned: and also for and during all that time have appointed, and of right ought to have appointed, and still of right ought to appoint, for the pains and trouble of each such herd, *a reasonable and proper* number of stints, of each of such herds, as last aforesaid, to be depastured in and upon the said place in which, &c.; and that for and during all the time aforesaid, the said last-mentioned body politic and corporate hath had and used, and been accustomed to have and use, and of right ought to have had and used, and still of right ought to have and use, for each of such herds as last aforesaid, common of pasture in and upon the said place in which, &c., for such and so many stints as were so appointed as aforesaid, of each of such herds as last aforesaid. Upon which plea a verdict was found for the Plaintiff.

The

The sufficiency of this plea was argued twice, (once in *Hilary*, and after an alteration in the entry of the verdicts, again, in the present term,) upon a rule *nisi*, which was obtained on the part of the avowants to enter up judgment for them, *non obstante veredicta*, on the ground that the plea was not sufficiently certain. *Wilde* and *Taddy* Serjts. for the Plaintiff; and *Pell* and *Cross* Serjts. for the Defendant.

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Argument for the plaintiff. The objection which has been made to these pleas is, that there is nothing in them by which it can be ascertained what is a reasonable number of herds, and what a reasonable number of stints; but after verdict the objection comes too late, supposing, even, that it was one which might have been successfully urged on demurrer. A verdict will cure the omission of the important allegation of levancy and couchancy, *Cheadle v. Miller* (a), or of a custom, *Stables v. Mellon* (b); and it may be presumed the jury have ascertained what was a reasonable number of herds and stints. In strict pleading, however, there is nothing uncertain in the word "reasonable," thus applied. In the common count for goods sold, the Plaintiff declares that the Defendant was indebted to him, as much as the goods were *reasonably* worth: when a parcener claims her share in an estate, though it is known what the amount of the share is, the writ is *de rationabili parte*: Copyhold fines must be *reasonable*; and in *Rastal*, 539. there is a writ for *reasonable estovers*. In *Abbot v. Weekly* (c), a custom was pleaded to dance in a close at all times of the year; and when it was objected that this was unreasonable, as it would admit of dancing when the close was laid down for hay, that plea was holden sufficient after verdict. So in *Hitch v.*

(a) 1 Lev. 196.

(b) 2 Lev. 246.

(c) 1 Lev. 176.

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Rawling (a) in a plea to have games at seasonable times of the year, it was, after verdict, holden not necessary to have shewn what were seasonable times. In all such cases, what is reasonable or seasonable is a question for the jury to determine. But on the present plea, the measure is sufficiently ascertained, even, for demurrer. The measure for the cattle is ascertained by levancy and couchancy; the herd is to have his reasonable reward for attending the cattle, and that reward must be according to the measure of the cattle. The measure for the corporation cattle will also be the measure for the herd cattle. Then it is not competent to the avowants to raise this objection, whoever else might raise it. Taking this avowry and the plea together, it appears that the original grant of common, was to the corporation for the benefit of the burgesses and servants to be appointed by them; they, therefore, cannot contest their servants' right, which is, indeed, parcel of their own, parcel of the same grant. This is not a power to the corporation to assign over a right of common, but a grant to the corporation and its servants: as, where a copyholder prescribes for common in the manor of another; he prescribes in the lord, and the lord claims for himself and his tenants. If the avowants say the original grant was bad, they have no title to distrain; if it was good, the plaintiff's right is the same as the avowants.

Argument for the avowants. The pleas set out a void prescription which no verdict can cure. The quantity of land and cattle to be superintended being certain, there is no excuse for leaving in uncertainty the number of herds to superintend. Besides, the functions of the herds are nowhere ascertained: superintending the land and cattle, might have formed but a small portion of

(a) 2 H. Bl. 394.

them,

them, for they are appointed to do this "among other things," and what the other things were, nowhere appears; they might have been to support the interests of the corporation at an election, or any other object equally unconnected with the land. Then it does not appear to have been left to the jury to find, nor have they found what was a reasonable number of herds or stints; and the kind of common claimed for these herds, is of a species new to the law: a right of common in gross, — for an indefinite number of persons, — for an indefinite number of cattle, — without any allegation whose cattle they are to be, — or whether commonable or not, — or of the times of the year at which they are to be turned on, — or any other qualification. According to *Mellor v. Spateman* (a), a plea of common *sans nombre* cannot be supported for the inhabitants of a town. This is in effect such a plea, and equally uncertain, though it does not in terms, claim a right to that extent.

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BEST C. J. The principal objection which has been urged against these pleas, is, that the right of the herds has not been alleged with sufficient certainty. However, it is not necessary for us to determine whether or not this right has been alleged with sufficient certainty to withstand the scrutiny of a special demurrer, because the objection is made after verdict. But by analogy to the instances which have been put on the part of the Plaintiff, the allegation appears to be sufficient, and it could not easily have been made with greater certainty; because the reasonableness of the number of herds must vary from time to time, must depend on the number of cattle the common can bear in any one year, and no greater certainty has been required in the various instances cited. Thus in a claim by one of three parceners she is not bound to demand a third part, but her reasonable part of the pro-

(a) 1 Saund. 346 c. per Kelynge J.

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perty. If that mode of pleading be sufficient for parceners, it ought surely to be sufficient for these herds. Again, where a custom is pleaded to exist at all seasonable times of the year, a jury may find what are the seasonable times. So that it is probable this objection would not have been sustained on demurrer. Then comes the question as to the validity of the custom itself; and in considering this, the avowry and the plea have been properly connected by the counsel for the Plaintiff. If the custom as it appears on the face of both, is consistent with reason and justice, and has subsisted time out of mind, it cannot now be impugned. In this avowry the corporation state a grant, the existence of which the Plaintiff admits in his plea, but he says, in effect, I must add something to that statement. When the grant was first proposed, the burgesses of *Alnwick* may easily be imagined to have said, such a grant will be useless to us, unless we have herds to superintend our cattle, and as we have no means of paying for their service, the remuneration must be, by allowing them, under the same grant, certain stints, *i. e.*, a right to feed a certain number of cattle on the same land. There is nothing unreasonable in such a supposition, or such a grant; and if the grant were of this nature, which is now determined by the verdict of the jury, it is a grant to the herds as well as to the burgesses, and there remains no foundation for the objection that what the Plaintiffs claim, is an assignment of a right of common existing in the burgesses only. It is true that such a right cannot be assigned, but there is no rule of law which prohibits a grant such as that which is here pleaded.

PARK J. I think this case is concluded by the verdict, though I do not think it clear that the plea could have been sustained upon special demurrer.

BURROUGH J. We may intend that the grants to these burgesses and their herds were contemporaneous, *De Vesci* gives a right of common to the burgesses of *Alnwick*, and at the same time, he says, you shall have herds to superintend your cattle, and pay them by a participation in the use of the common. There is nothing unreasonable or illegal in that; and as to the alleged uncertainty in pleading that the burgesses were to appoint a *reasonable* number of herds, it is precisely what the plea ought to state, because the number ought to vary according to times and circumstances. The verdict which has been found is consistent with sense and justice; and the rule for a judgment, *non obstante*, must be discharged.

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GASELEE J. The right which has been pleaded stands on prescription, and it does not appear but that both grants might have been made at the same moment. Whether the pleas would have been sufficient on special demurrer, it is not necessary now to decide, neither is it necessary to notice the objection that the times at which the right is to be exercised, have not been stated, because that was a point which the jury were competent to ascertain. There is nothing illegal in a grant of common to the burgesses, with a concurrent grant to the herds who might be necessary to superintend the common. It has been urged that the grant is bad in the present instance, because it amounts to a grant *sans nombre*; but this is not so; for the nomination of the herds is entrusted to a select body, and it is not to be presumed that they will appoint more than a reasonable number; if they had done so, it might have been pleaded; if any of the numerous allegations in the plea are untrue, they might have been traversed: but in finding that the herds were accustomed to have their stints, the

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jury have in effect found all the other allegations. There is no ground for the Court to interfere, and the rule which has been obtained by the avowants must be

Discharged.

May 21.

HELLINGS v. JONES.

An attorney who stays proceedings upon an undertaking to pay costs, is bound to fulfil his engagement, although his client dies before bail is put in.

THE Defendant's attorney in this cause, soon after the writ was sued out, applied to stay proceedings, and entered into an undertaking to pay the costs, but before the time for putting in bail arrived, the Defendant died insolvent, when the attorney thinking himself exonerated, refused to fulfil his engagement.

Pell Serjt. having obtained a rule *nisi*, calling on him to do so,

Wilde Serjt. who shewed cause, contended that the death of the party discharged the attorney from his undertaking. And the

Prothonotary saying there was no settled practice on the subject, the Court took time to enquire.

BEST C. J. now said, that upon enquiry they found there was no settled practice; but they thought the attorney bound to fulfil his engagement, after such an admission of the Plaintiff's claim.

Rule absolute.

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WILLIAMS and Others v. RAWLINSON.

May 11.

ONE *Threlfall* having a banking account with the Plaintiffs, bankers in *London*, and being indebted to them on that account 10,247*l.* 9*s.* 1*d.*, under a balance struck in *January* 1822, the Defendant and others then executed to the Plaintiffs a bond on a 9*l.* stamp, in the penal sum of 10,000*l.*, the recital to the condition of which bond stated, that the said *John Threlfall* had for some time past had a banking account with the obligees; that the Defendant and others had agreed to join *Threlfall* in the above bond, for the purposes and on the conditions thereunder written; and that it had been expressly agreed between the above parties, that such bond should not in anywise prejudice or affect a certain bond bearing date the 29th day of *November* 1817, which was executed and given by the said *John Threlfall* and others to the above obligees, and their late partner *William Moffatt*, the younger; but that all rights and remedies under or by virtue thereof, should remain in full force and effect;

And the condition was, that if *Threlfall*, his heirs, executors, or administrators, should from time to time and at all times thereafter reimburse to the obligees or the

affect a prior security given to Plaintiffs by *T.* in 1817; but no notice was given to Defendant by Plaintiffs that *T.* was indebted to them 10,000*l.* at the time the Defendant executed his bond; *T.*, however, saw the accounts every fortnight, and received the vouchers half-yearly.

At the close of his account, *T.* was indebted to the Plaintiffs more than 10,000*l.*, but subsequently to the executing of the Defendant's bond he had paid into the Plaintiff's bank more than 5000*l.* :

Held, that the Defendant was liable to the extent of 5000*l.*

Held, also, that the Defendant's bond did not require a 2*l.* stamp.

T. having a banking account with Plaintiffs, on which he was indebted to them 10,000*l.* in 1822, Defendant then executed a bond, conditioned to secure Plaintiffs for any sums which for ten years Plaintiffs should advance on bills, &c. which *T.* should from time to time draw on them or make payable at their house, and all cheques, &c. not exceeding 5000*l.* in the whole. It was agreed that this bond should not

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survivor of them, and every other person who should become partner with them in the banking business, their executors or administrators, all and every sum and sums of money, which the obligees or the survivor of them, or any partner in their banking-house, should within ten years thereof advance or pay, or be liable to advance or pay on account of accepting, indorsing, discounting, paying, or satisfying any bill or bills of exchange, drafts, notes, orders, or other engagements whatsoever, that the said *Threlfall* should from time to time draw or cause to be drawn on them, or make payable at their banking-house; and also all other sums of money which the obligees or the survivor of them, or any partner in their banking business, should lay out or advance or become liable to pay on the credit of *Threlfall* or on his account, and all such charges and allowances for advancing and paying such bill or bills, drafts, notes, acceptances, advances, payments, engagements, and accommodations, not exceeding the sum of 5000*l.* in the whole, together with interest for such sum and sums of money as they or any of them should at any time within the period aforesaid be in advance on account of *Threlfall*, as is usually charged by bankers in such and the like cases; and should from time to time and at all times within the period, and to the amount aforesaid, indemnify the obligees or the survivor of them, or any partner in their banking business, from all actions, suits, losses, costs, charges, expences, and demands which should be occasioned by their accepting, indorsing, discounting, paying, &c. for *Threlfall* as aforesaid, then the bond was to be void.

In an action on this bond, the breach of condition suggested, was, that after the making of the bond in *January* 1822, and before the commencement of this suit, the Plaintiffs had advanced and paid, and were liable to
 advance

advance and pay a large sum, to wit, 20,000*l.* for accepting, indorsing, discounting, paying, &c. bills, &c. which *Threlfall* during the time last aforesaid had drawn upon and made payable at their banking-house; and that they had otherwise laid out and were liable to pay on the credit of *Threlfall* other sums to a large amount, to wit, the amount of 10,000*l.*, and that the charges and allowances upon such payments, &c. at the rate usually charged by bankers, amounted to a further large sum, to wit, 5000*l.*; that the several sums so advanced and paid, and the charges upon them, amounted to a large sum, *exceeding* the sum of 5000*l.*, to wit, to 35,000*l.*, of which premises *Threlfall* had notice, and yet neither he, the Defendant, nor the other obligors, had reimbursed the Plaintiffs the 5000*l.*

At the trial before *Best C. J.*, *Guildhall* sittings after *Hilary* term last, it appeared that subsequently to the execution of the bond in 1822, the Plaintiffs had continued their advances to *Threlfall*, and at the close of the account afterwards, upon his becoming bankrupt, he stood indebted to them 10,732*l.* 12*s.* 11*d.* But subsequently to the first advances to the extent of 15,000*l.* after the execution of the bond, he had paid into the Plaintiff's bank more than the sum of 5000*l.*; and it did not appear that at the time of executing the bond the Defendant had received any notice that *Threlfall* then owed the Plaintiff 10,247*l.* 9*s.* 1*d.* *Threlfall*, however, saw the accounts every fortnight, received the vouchers half-yearly, and knew how the payments were applied.

The jury found a verdict for the Plaintiffs for 3978*l.* (1022*l.* having previously been paid on account), subject to a motion to be made to this Court to reduce the amount to 485*l.* 2*s.* 10*d.* (the difference between the first balance above mentioned and the last), if the Court should think fit.

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Cross Serjt. accordingly moved for a rule *nisi* to that effect, on the ground, first, that if this bond were intended to secure successive advances of 5000*l.* each, to an unlimited extent, it ought to have had a 25*l.* stamp. Secondly, that however the law might be as between the creditor and the debtor, yet, as between the creditor and the surety, (who was ignorant of the debt of 10,247*l.* 9*s.* 1*d.* outstanding at the time of his executing the bond), and according to the true construction of the bond, the sums paid in by *Threlfall* after the execution of the bond, ought to be applied, first, in liquidating advances made also after the execution of the bond, and not to the preceding debt of 10,247*l.* 9*s.* 1*d.*; and that the bond was intended to cover only one advance of 5000*l.*

The *Court* said there was nothing in the first objection, but granted on the second a rule; against which

Wilde Serjt. now shewed cause, and referred to *Clayton's case* (a), *Brooke v. Enderby* (b), and *Bodenham v. Purchase* (c), to shew that either the creditor or the debtor must have applied the sums paid after the execution of the bond to the liquidation of the sums advanced after that time, in order to enable the surety to say that they had been so applied; when the *Court* called on

Cross to support his rule. He urged, that the principle with respect to the application of payment by creditor or debtor did not apply to this case, in which the chief question was, what was the intention of the Plaintiffs and Defendant as far as it could be collected on the face of the bond. The intention was, that the De-

(a) 1 *Merivale*, 372. (b) 2 *B. & B.* 70. (c) 2 *B. & A.* 39.

defendant

defendant should give security, not for a past, but for a future account; this appeared from the recital, which referred only to future accounts, and which expressly stated that the new security should not prejudice the old one already in the Plaintiff's hands, whence it must be inferred that the old debt was to be covered by the old security. In *Bodenham v. Purchase*, the intention to secure the old balance was expressly stated, but the banking account contemplated by these parties, was an account to commence from the time of executing the bond; and as against the Defendant, the Plaintiff had no right to alter that mode of accounting without the Defendant's consent. The Defendant, too, was a surety; a species of insurer, in whose case all the rules of insurance apply, and if there be any misrepresentation or any concealment, no claim can be made against him. In *Pidcock v. Bishop*, (K. B. *Hilary* term last,) the Plaintiff refused to supply a customer with certain iron, unless he procured the guarantee of the Defendant. The Defendant having given his guarantee, the Plaintiff, in order by that means to cover an old debt due to him from the customer, charged the customer for the iron, a sum far beyond the regular price; and it was holden, that this contrivance exonerated the Defendant from his guarantee: in the present case it no where appears that the Plaintiff apprised the Defendants of the fact, that *Threlfall* was already 10,247l. 9s. 1d. in their debt, and that his first advances must be applied to liquidate that sum, which, if they had done, it is possible the Defendant might have declined to enter into the bond.

BEST C. J. On the part of the Defendant, this case has been put on the only ground which it was possible to urge. If I could collect on the face of the bond, that it was intended that the various sums paid in to the Plaintiff's bank by *Threlfall*, subsequently to the execution

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cution of the bond, should go to the new account, the Defendant would be entitled to make his rule absolute. But the contrary appears; and it was impossible for the Plaintiffs to have entered into such an agreement, for had they done so, the 10,000*l.* already due might never have been paid, and in the absence of any agreement touching the debts to which the subsequent payments were to be applied, the Plaintiff had a right to apply them first in discharge of the earlier account. The bond recites, that *Threlfall* had had a banking account with the obligees, and that the Defendant and others had agreed to join *Threlfall* in the bond for the purposes and on the conditions therein contained, and that it had been agreed that the bond should not prejudice a prior bond given by *Threlfall* to the obligees;— These words are not very clear, but I cannot collect from them any agreement, that money subsequently received should not be applied in discharge of the prior debt. When the money was paid, nothing was said as to the account to which it was to be applied, and if the two accounts were blended, the course of business is to apply the payments to the earlier; that is the principle laid down in *Clayton's case*, and confirmed in *Bodenham v. Purchase*; but here, the accounts must have been blended, for the Defendant's principal agreed to such an application of his payments; his accounts were settled half yearly, and he must have seen that the remittances subsequent to the bond had been applied to the 10,000*l.* If so, *cadit questio*; for, unless by distinct agreement, the surety can have no control over the way in which the principal shall make his payments, and no such agreement appears on the face of the bond. The case of *Pidcock v. Bishop*, as it has been stated, does not apply to the present, for the whole transaction between the creditor and the debtor was a direct fraud upon the surety, and there is no pretence for imputing fraud to the present Plaintiffs. It has been argued, that the Defendant's

defendant's undertaking is analogous to an insurance; a transaction, in which, according to Lord *Mansfield*, there must always be *uberrima fides*; but the same learned person, upon the occasion in which he established that position, referred also to the maxim, *aliud est tacere, aliud celare*. But there has been nothing like an improper concealment in this cause; it might have been pleaded, if there had; the bond was expressly given for the continuance of an old banking account, and it is well known that such accounts are not carried on till the old balance has been secured.

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PARK J. There is no colour for reducing the verdict which has been given; if the defence had been founded on fraud or undue concealment, the result might have been very different; and in *Pidcock v. Bishop*, as the case has been stated to us, the decision of the Court must have turned on the fraud practised on the surety. In the present instance nothing has been done which was not warranted by the course of business.

BURROUGH J. concurred.

GASELEE J. I feel considerable difficulty in this case, and am not prepared to say that the judgment the Court is pronouncing is altogether satisfactory to me; but I can find no authority the other way, and therefore concur in the decision we have come to. The bond was to run for ten years. *Threlfall* was to commence a new account; and it is not clear that it was not the intention of the parties that all sums paid in by him subsequently should be carried to that account, or that the partners should rely on the old securities for the payment of the old account; but I can see no agreement on the part of the bankers to let the payment of the 10,000*l.* stand by for so many years; and if there had been any undue concealment on that head, it might have been pleaded.

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Had the bond clearly stated the existence of the former balance, there could have been no difficulty; but even as the case stands at present, the Defendant's rule must be

Discharged.

Cross then moved in arrest of judgment, that, according to the terms of the bond, the Plaintiffs were not to allow *Threlfall* to be more than 5000*l.* in their debt at one time; whereas it was averred that he owed them a sum exceeding 5000*l.*, to wit, 35,000*l.* at the time of the action. If they had limited their credit to 5000*l.*, as the Defendant intended, *Threlfall* might never have been involved in difficulty, and the Defendant never have been called on. He might have known enough of *Threlfall* to be willing to trust him with a limited credit of 5000*l.*, but might have foreseen, as he had refused to incur, the risk of a more extended credit.

But the Court thought there was nothing in the objection, the meaning of the bond being clearly that whatever the Plaintiffs advanced, the Defendant would contribute 5000*l.* towards indemnifying them; and

Cross

Took nothing.

May 13.

PIKE v. CARTER.

Trespass does not lie against a magistrate for any thing done in the discharge of his duty, unless he is made acquainted with all the circumstances under which he is called on to act.

THIS was an action of trespass *vi et armis* for taking the money of the Plaintiff, to which the Defendant pleaded the general issue. At the *Summer* assizes 1824,

for

for the county of *Southampton*, a verdict was found, by consent, for the Plaintiff, with 6*l.* 14*s.* 6*d.* damages, subject to the opinion of the Court upon the following case :

The Plaintiff was at the time of the trespass complained of, and still is, the treasurer of a friendly society, called "The General Benefit Society," holding its meetings at *Portsea*, within the borough of *Portsmouth*. The Defendant was a magistrate of the borough of *Portsmouth*.

The General Union Benefit Society was instituted in the year 1818, and the rules of the society (which were to be considered as part of the case, and referred to if necessary) were allowed and confirmed at the general quarter sessions of the peace, holden in and for the county of *Southampton* at *Winchester*, on the 25th *October* in that year.

Among these rules was the following: "In order to settle any case in dispute between this society and any of its members, their executors, administrators, or other person or persons claiming under any member or members relating to the breach of any of the clauses of these regulations, or the withholding of the benefit, or expelling any member from the society, or any other account; It is hereby finally agreed, that the dissatisfied party or parties shall have such case fairly arbitrated, upon leaving notice at the society-house within two months after such dispute, or notice of expulsion, if such dissatisfied party or parties live within three miles from the society-house, but if such dissatisfied party or parties live more than three miles from the society-house, then within three months after such dispute, or notice of expulsion; and for that purpose such dissatisfied party or parties shall choose three persons who are members of this society; and the audit or general committee shall choose three other members of this society; and the six members so chosen, or the majority of them, shall appoint three more members of this society, which nine mem-
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bers so appointed, shall act as arbitrators, and meet and consider the case in dispute within one month from the time the notice of such arbitration was so left at the society-house. And whatever award, order, or determination shall be made by the said arbitrators, or the major part of them, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without appeal, or being subject to the controul of two or more justices of the peace, provided such an award be made in writing by the said arbitrators, or the major part of them, within one hour next after such case shall be determined. Any person desiring his case to be arbitrated, shall deposit in the hands of the treasurer 10s. 6d.; and in case such arbitration shall be given in his favour the 10s. 6d. shall be returned, and the expences paid by the society, but if the case is decided against him, the expence shall be paid from the deposit."

In 1818 *Thomas Spraggs* was admitted a member of this society. In *September 1823*, *Spraggs*, who then had been for some months in the receipt of relief from the society, applied for further relief, which was refused on the ground of an alleged violation by him of one of the rules of the society. In consequence of this refusal, *Spraggs*, upon two several occasions, applied to the magistrates of *Portsmouth*, who having duly summoned the officers of the society, made two several orders for his relief, (to be referred to, if necessary, as part of the case) which orders not having been complied with, the Defendant, as a magistrate, signed two several warrants of distress, under which, money collected from the society, and vested in the Plaintiff as treasurer, was on the 6th *December 1823*, and the 27th of *February 1824*, forcibly taken from a box in the custody of the Plaintiff as treasurer of the society.

On the 10th of *April 1824*, the Plaintiff by his attorney gave the Defendant a notice, duly signed and indorsed,

dorsed, according to the statute in that behalf; and on the 12th of *May* 1824, the action was commenced by suing out a writ in this Court.

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At the trial no evidence was offered on either side, but it was agreed between the counsel, that the admissibility of any of the evidence should be open to argument on the case.

The question for the opinion of the Court was, whether this action could be maintained. If the Court should be of opinion that it could, then the verdict was to stand; if not, a verdict was to be entered for the Defendant.

By the 33 G. 3. c. 54. s. 15. it is enacted, "if any member of such society shall think himself aggrieved by any act done or omitted to be done by such society, or any person acting under them, it shall be lawful for the justices near unto the place where such society shall be established, on complaint made upon oath or affirmation, to issue their summons to the presidents, stewards, or other officers of such society, or one of them, in case such complaint shall be made against such society collectively; and in case it be made against any person appointed to such office, then to summon such person to appear before such justices, at a time and place to be named in such summons, and also to summon at the same time and place, if there be occasion, all persons who shall appear to such justices to have the custody of the rules of such society; and such justices, at the time and place named in such summons, whether the person summoned shall or shall not appear, on proof upon oath or affirmation of such summons being served, or left at his abode, shall proceed to hear and determine, in a summary way, the matter of such complaint, according to the meaning of the rules of such society confirmed by the justices according to this act, and shall make such order therein as shall seem just, which shall be final and

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not subject to appeal, or to be removed into any court of record at *Westminster*." By section 16. it is further enacted, "that *if provision shall be made by one or more of the general rules or orders of any such society, and confirmed as required by the act, for a reference by arbitration of any matter in dispute* between any such society, or any person or persons acting under them, and any individual members thereof, *the matter so in dispute shall be referred to such arbitrators as shall be named and elected, in such manner as shall be prescribed by such general rules or orders, and whatever award, order, or determination shall be made by the said arbitrators, or the major part of them, according to the true purport and meaning of the rules and orders of such society, confirmed by the justices according to the directions of this act, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without appeal, or being subject to the controul of two or more justices of the peace in the manner hereinbefore prescribed.*"

The case was argued at great length by *Bosanquet* Serjt. for the Plaintiff, and *Wilde* Serjt. for the Defendant, exclusively on the construction to be given to the statute; viz. whether the 16th section, connected with the rule of the society did not exclude the defendant's jurisdiction: but as the decision turned on another point, the arguments are here omitted.

The Court having taken time to consider, found, in the order issued by the Defendant and another magistrate for the relief of *Spraggs*, (and appended to the case), the following passage: "The said *John Holmes* (the treasurer of the society) having appeared before us to answer the matters of the said complaint," (which was stated to have been twice made on oath,) "*but not making any defence, we do order,*" &c.; and the judgment of the Court was this day delivered by

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BEST C. J., who, after reading the case, and referring to the various orders of the magistrates appended to it, said, There is only one fact which it is necessary to advert to in these orders, namely, that when the parties were first summoned before the magistrate, one of the members attended on behalf of the society, and made no defence, although it is stated that the magistrate heard the charge proved on oath; and that upon the second summons no one attended, but the charge was again proved on oath. It is not necessary for us now to decide, whether or not it was imperative on *Spraggs* to have applied for an arbitration, according to the rule of the society, because an action of trespass will not lie against a public officer for any thing which, in the discharge of his duty, he has been called on to do, without an opportunity having been afforded him of judging of all the circumstances under which he is to act, and here no defence was made on the part of the society, nor was the attention of the magistrate called to the society's rule for arbitration.

This case arises on the 33 G. 3. c. 54., and I have reason to think that the framers of that measure thought unfavorably of its results, when it was found that, after the hard earnings of poor persons had been invested in benefit societies as a provision against disease and age, the funds of those societies were often squandered in useless litigation, or otherwise improperly dissipated. By the fifteenth section of that act, however, the magistrates are invested with a general jurisdiction in the case of all societies whose rules have been confirmed at the quarter sessions, but the sixteenth section sets up as an exception, that where the rules of the society contain a clause enabling the members to refer their disputes to arbitration, the disputes shall be referred, and the award be final, without its being in the power of the magistrates to interfere. Now when a party relies on an exception from a general law, the burthen is on him to shew that

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his case falls within the exception; and if the society had produced before the magistrate the clause in their rules enabling them to refer their disputes to arbitration the magistrate would have had an opportunity of judging whether he possessed any jurisdiction or not; but they omitted to do this, and the magistrate's attention was never called to the denial of his jurisdiction: was he then, without notice, bound to be acquainted with a private regulation of the society, forming no part of the general law of the land? If he had pleaded his general jurisdiction in the concerns of the society under the fifteenth section of the statute, the Plaintiff, in order to establish his case, must in his reply have averred that the Defendant had notice of the society's rule, and he would have been left to establish by proof that exemption which he claims only under a particular exception.

This is like the case of a privileged person who, upon being arrested, omits to give notice of his privilege: can he in such case maintain an action of trespass against the officer who arrested him? Undoubtedly not. So if a man resides within the ambit of a local jurisdiction, can he complain of a violation of his franchise, if he himself has omitted to apprise the party against whom he complains of the right which he proposes to assert? Upon every principle of common sense and justice, I should determine that this action could not be maintained, even if there were no decision on the point; but in *Louther v. The Earl of Radnor* (a), it was holden that magistrates could not be affected as trespassers, if facts stated to them on oath by a complainant, were such whereof they had jurisdiction to enquire, and nothing appeared in answer to contradict the first statement.

Nothing of this kind was done in the present case before the magistrate's order was made; the rule of the

(a) 8 East, 113.

society was not presented to his notice, nor was his jurisdiction questioned. *Grase J.* doubted whether in such a case the Court could take notice of any thing but what appeared on the face of the order (a), and *Lawrence J.* whether, if the magistrates made an order against the evidence laid before them, the party injured would not have another sort of remedy. (b) So that we have the opinion of the whole Court of King's Bench, that, before any action can be brought against a magistrate for any thing done in the discharge of his duty, it must appear that his attention was called to all the facts necessary to enable him to form a judgment as to the course he ought to have pursued.

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Therefore, without touching the question whether the clause in the 33 G. 3. c. 54. concerning arbitration for Friendly Societies is optional or imperative on the dissatisfied member, our judgment in the present case must be for the Defendant.

(a) 8 East, 118.

(b) *Ibid.*

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PELL Serjt. now produced affidavits, which stated, Where, in a special case, judgment was given for the Defendant that this case had been taken on admissions at the assizes, the sole object of the action being to ascertain upon a point not mentioned in the case or argument, and on a supposed state of facts, collected by the Court from a document appended to the case, but the reverse of those which really took place, — the Court refused to stay proceedings or reconsider the case without the Defendant's consent, — although a statement of the real facts as to this point, contained in the case when agreed on by the Defendant's junior counsel, engrossed, and signed by the Plaintiff's leading counsel, had been afterwards struck out by the Defendant's counsel, because not enumerated in a collection of facts agreed on at the trial of the cause with a view to the special case; but the statement was never disputed; and the Defendant's counsel had been instructed to direct, and had directed, the argument exclusively to another point.

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whether or not the magistrates had jurisdiction over the concerns of the society ;

That when the treasurer of the society was **summoned** before them on *Spragg's* complaint, *he had expressly contested the magistrates' jurisdiction, and had exhibited to him the rule of the society, enabling it to settle disputes by arbitration ;*

That the special case, as first agreed on by *Selwyn*, the Defendant's junior counsel, engrossed, and signed by *Pell Serjt.*, the Plaintiff's leading counsel, contained the following passage ;

" The treasurer of the society, when he appeared before the magistrate, refused to enter into the merits of Spragg's case, contending that, under 33 G. 3. c. 54. s. 16., the magistrates had no jurisdiction in the matter ;"

That this passage was afterwards struck out by the Defendant's counsel ;

That, with a view to avoid a renewal of delays, occasioned entirely on the part of the Defendant, which had at that time been very prejudicial to the Plaintiff's society, and in the understanding (existing on both sides, as the deponent believed) that no point would be argued but the construction of the stat. 33 G. 3. c. 54., the Plaintiff's agent forbore to insist on the restitution of this passage to the case : —

He then moved, that, under these circumstances, proceedings might be staid until the case had been reconsidered, upon a restitution of the passage so struck out as above ; especially as the decision of the Court had turned on a point never adverted to in argument, and on which the Plaintiff had never been heard.

Wilde Serjt., on being applied to by the Court, admitted, that his instructions were, to argue the case solely on the construction of the statute, but that he was not instructed to relinquish any point which might turn

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up to the advantage of the Defendant. He said, that the various facts proposed to be inserted in the special case had been enumerated and reduced to writing before the Judge who presided at the assizes, and that the passage in question had been struck out, because it stated a fact which did not appear among those so enumerated.

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BEST C. J. The motion which has been made is of a novel description, and if acceded to might establish a precedent most prejudicial to the suitors of the court. We cannot allow it, for it would lead to endless disputes as to what took place before each case was presented to the Court. My Brother *Wilde* now says, that the passage in question was struck out, because it stated a fact which was not among those taken down at the trial of the cause, with a view to the framing of the special case; there is, therefore, no ground for the application which has been made. If, however, the Defendant will consent to put the case in a new shape, so as to bring the question of the magistrates' jurisdiction neatly before us, I will not refuse, upon this single occasion, to reconsider the case; but I will never allow such a course to be pursued again.

The Defendant having afterwards been applied to for his consent, said he must consult his counsel, and the consent having never been given, *Pell*

Took nothing.

But the Defendant having obtained the decision of the Court in the way above described, signed judgment, and applied to the Prothonotary for his *double costs* as a *magistrate*.

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May 13.

DUNNE v. ANDERSON.

Plaintiff, a surgeon, petitioned parliament against quacks.

Defendant, a journalist, commented severely on the contents of the petition, and charged the Defendant with ignorance of his profession, pointing out ignorance of chemistry, which, he said, appeared on the face of the petition.

Plaintiff then sued Defendant for libelling him in his profession of a surgeon; — the Judge directed the jury, that if they considered the De-

fendant's attack a fair comment on the Plaintiff's petition, — if the charge of ignorance was collected from the petition alone, and was not the spontaneous effusion of malice in the Defendant, — the writing in question was no libel; he also directed them to consider whether the Defendant had imputed to the Plaintiff ignorance in his profession of a surgeon or ignorance of chemistry, for if they thought the latter, the declaration was not adapted to the Plaintiff's case.

The jury having found a verdict for the Defendant, the Court granted a new trial, costs to abide the event.

Quere, Whether a petition to parliament on matters of general importance is such a publication as renders the petitioner an object of fair criticism and comment.

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THE declaration stated that Plaintiff, long before and at the time of the publishing the libels by Defendant thereafter mentioned, was and still is a surgeon, and the profession of a surgeon used, exercised, and carried on, to wit, at *Westminster*, in the county of *Middlesex*, and in the course and exercise of such his profession, had always conducted himself with great skill, knowledge, fairness, regularity, and ability, and had not only never been guilty of quackery, empiricism, puffing, and humbugging, or other dishonorable, unlawful, or disgraceful practices, but, until the time of publishing the libels thereafter mentioned was never suspected of having been guilty of such practices, or any of them; and by means of the premises was daily acquiring great gains and profits in the way of his said profession, to the comfortable support of himself and his family, and the great increase of his riches, and had acquired and enjoyed the friendship, good opinion, regard, and esteem of all his neighbours, patients, and other good and worthy subjects of this realm, to wit, at, &c. &c.

That before and at the time of committing the grievances thereafter mentioned, Plaintiff was and

still is a member of the Royal College of Surgeons in *London*;

That before that time Plaintiff had established, set up, and carried on, and still did carry on, in *Regent-street, Westminster*, a certain establishment by and under the name of the Athenée and Royal Institute, a branch of the Athenæion, from the carrying on of which he was daily deriving sundry great gains and profits;

That before that time Plaintiff had presented to the Honorable the Commons of the United Kingdom of *Great Britain and Ireland*, in parliament assembled, a petition for, among others, certain purposes, to wit, for its parliamentary sanction and legislative authority against the practice of empiricism in *England*, for supporting the just privilege of real professional merit, for enforcing the honest discharge of their duty by medical persons towards the public, and to associate the profession to give gratuitous advice in the different districts or counties, by branches, on the same plan as pursued in the National Vaccine establishment: yet the Defendant, well knowing the premises, but contriving, and wrongfully and maliciously intending, wilfully and maliciously to injure Plaintiff, not only in his said profession of a surgeon, but in his general character; to destroy his good name, fame, credit, and reputation; to bring him into great public scandal, infamy, and disgrace with and amongst all his neighbours, patients, and other good and worthy subjects of this realm; and to cause it to be suspected and believed by those neighbours, patients, and subjects that Plaintiff was a quack and empiric, and had been and was guilty of the offences and misconduct thereinafter mentioned, and to vex, harrass, and oppress, him, theretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did publish, and cause and procure to be published, of and concern Plaintiff, and of and concerning him as a surgeon as aforesaid,

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aforesaid, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, libellous, and defamatory matter following of and concerning Plaintiff, and of and concerning him as a surgeon as aforesaid, that is to say,

“ Humbug petition to parliament; (meaning said petition of Plaintiff), a Mr. *Dunn*, of *Regent-street* (meaning Plaintiff), has taken up the idea started by us, and petitioned parliament to abolish quackery and the sale of patent medicines. Had this been a genuine straight forward thing, we should have been the first to hail it as a symptom of reform in the grossest of our national grievances. Had it been, in short, a petition from the people, who suffer in purse and person by the legal robberies of quacks, legitimate and illegitimate, it would have been all very well. But coming thus, in the shape of a humbug puff (meaning that said petition was a humbug puff) from an unknown and an ignorant man (meaning Plaintiff), who has set up a Royal Medical Institute (meaning said *Athenée* and Royal Institute, set up in *Regent-street* aforesaid) in rivalry of *Jordan's* Medical Establishment, or *Nisbet's* Army Board, or *Eady's* Soho concern, or *Kiernan's* Humbug in *Leicester-square*, (meaning certain quack and empirical establishments before then established, set up, and carried on by divers persons, and meaning that the said establishment of Plaintiff was an establishment of the same description as the said various quack and empirical establishments aforesaid), we must pause. — This petition (meaning said petition of Plaintiff) indeed is the most barefaced puff we recollect to have ever seen, and by a person (meaning Plaintiff) who, though he may have passed muster at the College (meaning the Royal College of Surgeons in *London*) after paying his guineas, is profoundly ignorant of the science of his profession, (meaning the said profession of a surgeon, which he Plaintiff so used and exercised

exercised and carried on as aforesaid,) and would be put to the blush by any one of the quacks whom he evidently wishes to rival. We should not hesitate to match against his (meaning Plaintiff's) chemical knowledge either *Eady*, *M'Donald*, (meaning certain quacks and empirics,) or the quack letter-puffer of the *French* tonic wine; (meaning a certain quack medicine called or known by the name of the *French Tonic Wine*;) and yet has this Mr. *Dunne* (meaning Plaintiff,) a member, as he tells us, of the Royal College of Surgeons, the assurance to come before the House with a petition, praying the abolition of all quack medicines until they shall have been analysed. As for his college membership, we hold that cheap; as *Taylor and Son*, *Caton*, *Goss*, and *Co.*, and many others equally notorious, can claim, we understand, the same distinction. But you must hear the humbug petitioner (meaning Plaintiff) himself, to understand the very deep knowledge which is possessed by a member of the Royal College of Surgeons. "On the Continent no medicines (similar to those with us called Patent) are permitted to be sold without first having been analysed by the constituted chemical authorities, and duly examined by the respective faculties of medicine. If this plan were adopted in *Britain*, your petitioner humbly submits many valuable lives would be saved annually, and not one-twentieth of the miserable objects would be found in our streets, or in our hospitals, as at present, and this might be effected without lessening materially the revenue produced by such poisonous means; for the reporters would naturally limit the use of such medicines to those diseases only in which they would be useful, and they would also prevent any improper article being introduced into the composition." After this display of chemical ignorance by the College Member (meaning Plaintiff) we would scarcely add a word: it is only matched by the grammatical blunders which
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abound in this parliamentary puff, (meaning said petition of Plaintiff,) as we may call it, of his Royal Medical Institute. Pray may we ask this analyser of quack medicines (meaning Plaintiff) what test he has discovered for hemlock, *digitalis*, hellebore, aconite, night-shade? And not to go into the dark regions of vegetable chemistry, may we ask him what analysis he can make of *James's Powder*? We advise him (meaning Plaintiff) to try to get an engagement in the Tonic Wine establishment, (meaning a certain quack or empirical establishment for the sale of a certain quack medicine called or known by the name of Tonic Wine,) to write puff letters for the concern, (meaning said last-mentioned quack or empirical establishment,) as it seems much more in his (meaning Plaintiff's) line than chemical analysis, of which, according to his own evidence, he knows nothing."

The Defendant pleaded the general issue.

At the trial before *Best C. J.*, at the last *Middlesex* sittings, the Plaintiff proved the publication of the alleged libel by the Defendant in a periodical journal, of which he was the proprietor. And also that he persisted in selling it, and in refusing to disclose the author's name, notwithstanding a remonstrance by the Plaintiff.

It was also proved that the Plaintiff was a member of the Royal College of Surgeons; it did not appear, however, that he was practising as a surgeon, but that he was proprietor of an establishment in *Regent Street, Westminster*, called the *Athenaion*, the precise objects of which were not distinctly shewn; but it seemed that lectures of various kinds had been given there, and that, in some way connected with it, an entertainment, consisting partly of music, and partly of poetry or lectures, had been announced at the *Argyle Rooms* in the same street.

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The Plaintiff's petition to the House of Commons, which it was proved had been read there, was as follows:

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"To the Honourable the Commons of the United Kingdom of *Great Britain and Ireland*, in Parliament assembled.

"The humble Petition of *Charles Dunne*, member of the Royal College of Surgeons in *London*, subscribed by other members of the same College,

"Sheweth, — That the present charter, whereby the functions and privileges of the members of the Royal College of Surgeons in *London* are regulated, so far from protecting regularly bred practitioners, often subjects them to injury and insult, by the tolerance of ignorant, disqualified, and unworthy persons, to practise the art and science of surgery in the very heart of our metropolis; the college, though a chartered body, not being authorised to prevent any person whatever from practising surgery, although it possesses sufficient power to punish its own members for any breach of its bye-laws.

"That for the better protection of the public and the community at large against the immorality and the horrors daily committed by quack doctors, and to secure the medical profession in general in its rights and immunities, as well individually as collectively, it is become necessary (from the extraordinary inundation of audacious empirics, who, of late years, have so shamelessly assumed the professional character) that an application be made to parliament for arresting the progress of so much moral turpitude in a country, whose laws are supposed to flow spontaneously to meet anticipated wrong.

"That, with a view to remedy, as much as possible, the baneful effects of medical quackery (practised by the very dregs of the people) it is amongst other things intended, that stations, after the plan of the *National Vaccine*

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Vaccine Establishment, shall be formed in various districts throughout the kingdom, where three members at least of the Royal College of Physicians and Surgeons in London shall attend every morning to give advice, without remuneration, to the indigent of both sexes, and that the institution, for these and other reasons equally cogent and irresistible, shall be intitled 'The Royal Medical Institute.' That one of the principal objects of this society be to preserve the dignity and just privileges of the respective classes of the physician, the surgeon, and the apothecary, and to support the credit of those persons who honorably demean themselves in their respective branches, — to promote useful and scientific communications, and fair and honorable practice, — to prevent abuses in the profession, — to punish pretenders to it, and to adopt such other measures as may be best calculated to ensure respectability to its members, and advantage to the community.

“That during ten years extensive practice on the continent of *Europe*, your petitioner never heard of any quack doctor being tolerated for an instant; on the contrary, if it were found that even any member of the profession acted in any way derogatory to his professional character, he would be immediately handed over to justice, to be dealt with according to a specific law in the code *Napoleon*, for the punishment of medical men and impostors pretending to medical knowledge. Your petitioner further humbly begs leave to observe, that, however speculation may be allowed to extend and ramify itself in other concerns of life, it should never be permitted in a well regulated government, in what regards the health and lives of our fellow creatures. Your petitioner has every reason to believe that, at the most moderate calculation, several thousands of lives are annually sacrificed through the ignorance and improper treatment of quack doctors, not to say any thing of

of the numerous miserable objects of disease in our streets and in our hospitals, the effects of their deadly nostrums.

“ That the malpractices of quack doctors are wisely guarded against in every country of *Europe*, except *Britain*; — for no person (under pain of fine and imprisonment,) is allowed to take the charge of the sick, or even to direct the application of medicines, without having gone through the proper ordeals of examination as to his professional knowledge and acquirements. In *England* it is notorious that we have not only carpenters, tailors, bricklayers’ labourers, lead-pencil-makers, *Jews* old-clothes men, journeymen linendrapers, and men of colour, but even women quacks, who practise their duplicities on the unwary and unthinking part of the public, by plundering all those who have the folly to approach them, whilst many are absolutely deprived of life by them, and others, who have the misfortune to escape death, are left to drag on a miserable existence with an entirely broken constitution for the remainder of their days. The baneful effects too of patent medicines, as they are called, deserve particular notice, the composition of which is formed in such a manner as to render their administration at all times dangerous, and but too often fraught with death: whereas on the continent no medicines (similar to those with us called patent) are permitted to be sold, without first having been analyzed by the constituted medical authorities, and duly examined by the respective faculties of medicine.

“ That if this plan were adopted in *Britain*, your petitioner humbly submits many valuable lives would be saved annually, and not one twentieth of the miserable objects would be found in our streets, or in our hospitals as at present; and this might be effected without lessening materially the revenue produced by such poisonous means, — for the reporters would naturally
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limit the use of such medicines to those diseases only in which they would be useful, and they would also prevent any improper article being introduced into their composition. Your petitioner, however, whilst he acknowledges that there are efficacious remedies for some few diseases, the mode of whose operation by which they cure is unknown, and such remedies are called specifics, as arsenic and cinchona in intermittents, — mercury in, and sulphur in psora, denies that quack medicines not composed of these ingredients, and applied in those diseases just mentioned, have any specific effects, and even if they had, he humbly submits, nevertheless, that it would not only be repugnant to reason, but prejudicial to society, to give a latitude to the unlearned, ignorant, unworthy and unprincipled quack, to do mischief by those pretended specifics for different maladies, which have no foundation in fact:—and whilst it shows the freedom of our laws in this respect, it affords an opportunity to those impostors to commit every species of fraud and depredation on the public, particularly to the ruin both of the pocket and constitution of the lower classes, always eager to flock for relief to those daring empirics, whose trade it is to hold out extraordinary promises to their dupes of their cures, which they know themselves totally unable to perform.

“ Your petitioner therefore most humbly prays that this Honourable House may, in its wisdom, rescue the *English* nation from the obloquy thrown upon it by foreigners of all nations, of being a nursery for those vipers denominated quack doctors, by making a law, rendering it a misdemeanour for any person (for the sake of gain or reward) to prescribe for the sick, without the necessary qualification of a diploma—and enable the present institute to prosecute to conviction disqualified persons so prescribing; or to adopt such other measures as may tend to eradicate this great evil, as in the

the superior judgment of this Honourable House may seem meet.

“ And your petitioner, as in duty bound,
will ever pray,

“ *Charles Dunne.*”

“ 164, *Regent Street*, 10th May, 1824.”

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Best C. J. told the jury, that if the publication complained of was a libel, it was aggravated by the Defendant's conduct at the time of the Plaintiff's remonstrance; it was, however, for the jury to consider whether that publication was a malicious and wanton attack upon the private or professional character of the Plaintiff, or whether it was no more than a fair comment on the Plaintiff's petition to the House of Commons. If the writer, without any ostensible cause for an attack, had come forward, as of his own knowledge, to impute to the Plaintiff ignorance in his profession of a surgeon, that would have been a libel for which, unless justified by proof of its truth, the writer would have been liable to answer in damages. But if he had not imputed ignorance to the Plaintiff, except in so far as he had collected the existence of ignorance from the contents of the Plaintiff's petition; if the attack was only through the sides of the petition, and not spontaneous; in short, if what had been written was no more than a fair comment on that petition, the Defendant was entitled to a verdict; for where a man obtruded himself on the public by proposing measures to affect the interests of the community at large, his proposals were legitimate objects of observation and criticism; and, if professing to instruct and reform the world, he manifested an incompetence for the task he chose to impose on himself, there could be no offence in warning the public against the incapacity of such a self-constituted instructor. The

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jury would also consider, whether the ignorance which the alleged libel imputed to the Plaintiff, meant ignorance in his profession of a surgeon, or ignorance in the profession of a chemist; for if they should be of opinion that the ignorance imputed, meant ignorance in the profession of a chemist, their verdict must be for the Defendant, inasmuch as the charge in the declaration was only for imputing ignorance to the Plaintiff in his profession of a surgeon.

The jury found a verdict for the Defendant.

Vaughan Serjt. moved for a rule *nisi* to set aside this verdict and have a new trial, on the ground, first, that the alleged libel clearly imputed to the Defendant ignorance in his profession of a surgeon; and, secondly, that a petition to the House of Commons was a communication so far privileged as to protect the petitioner from action or prosecution for libel by reason of any allegations contained in it (*Lake v. King (a)*); and therefore could not be deemed such a publication or obtrusion of the petitioner upon the notice of mankind, as to justify them, according to the principle of *Carr v. Hood (b)*, in making him the object of criticism or comment.

PARK J. said, he could not see that the present case fell within the principle of *Carr v. Hood*, as he was not prepared to say that a man who presented a petition to parliament placed himself in the situation of a publisher: the alleged libel also clearly imputed to the Plaintiff ignorance in his profession of a surgeon.

BURROUGH J. thought that ignorance in his profession of a surgeon was manifestly imputed to the

(a) 1 *Saund. Rep.* 131.

(b) 1 *Camp.* 355. n.

Plaintiff,

Plaintiff, and that, if the fact of his practising was not disputed, the jury ought not to be permitted to find a verdict against him.

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GASELEE J. also thought there was sufficient ground for a rule *nisi*, which was granted accordingly.

Spankie Serjt. now shewed cause against the rule, and after exposing the solecisms and ignorance of the common rules of grammar conspicuous on the face of the petition, contended, that, taking the whole of the alleged libel together, it only proposed to impute to the Plaintiff ignorance of chemistry, when it stated, that "he is profoundly ignorant of the science of his profession, and would be put to the blush by any of the quacks whom he evidently wishes to rival;" for the very next sentence explained the foregoing, by adding, "we should not be afraid to match against his *chemical knowledge, Eady,*" &c. ; and then, after an extract from the Plaintiff's petition, the writer proceeded, "after this display of *chemical ignorance* by the college member," —

He then argued that the construction of an alleged libel, and the ascertaining the motives with which it was published, was a compound question of law and fact, exclusively within the province of the jury; and that, therefore, a new trial ought not to be granted, because the Court might happen, in construing the writing in question, to draw a conclusion different from that to which the jury had come; for supposing the writing *did* impute to the Plaintiff ignorance in his profession of a surgeon, yet if this were done without malice, and in fair comment upon the Plaintiff's own productions, (a matter of fact which the jury alone were competent to ascertain,) there could be no ground for a new trial where the jury, as here, had determined that

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such was the fact. Admitting that the presentation of a petition to parliament, or to an officer of state, (*Fairman v. Ives (a)*), was not such a publication as would subject the petitioner to proceedings for libel on account of any allegations contained in the petition, yet, if the petition related to matters affecting the community at large, it was a publication that invited and justified fair criticism more than any other. If, according to the principle laid down in *Carr v. Hood*, the author of a book on ordinary topics became, by publishing it and offering himself to the notice of mankind, a fair object of criticism and comment, much more so did the author of a petition to the legislature, proposing measures extensively affecting the interests of the community. It was of the utmost importance not only that such measures should be fully and freely examined, but that the proposers of them should be exposed, if by a manifestation of weakness and ignorance they proved themselves incompetent to the task they had undertaken; such pretenders were the most dangerous enemies of improvement, by deterring men of real talents and knowledge from presenting themselves to the notice of the public, and it was therefore not only permissible, but a duty in every journalist to expose their ignorance.

[*Gaselee J.* That argument might perhaps apply, if the alleged libel had been a counterpetition to the legislature.]

There was nothing in the present publication from which malice could be inferred, and the Court would not grant a new trial where it was not likely 20*l.* damages would be recovered. *Marsh and Ux. v. Bower and Ux. (b)*

(a) 5 B. & A. 462.

(b) 2 W. Bl. 851.

Vaughan supported his rule upon the grounds on which it had been obtained, and *the Court*, without expressing any further opinion, made the rule absolute; the costs of the former trial to abide the event of the new trial.

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Rule absolute.

Upon the second trial the plaintiff recovered one farthing damages.

STEAD, DAKER, JACKSON, WAINWRIGHT, and
SOWDEN v. SALT.

May 13.

THE five Plaintiffs declared against the Defendant for work, labour, and materials, and on the common money counts.

The general issue was pleaded; and at the trial before *Bayley J.*, *York Lent* assizes 1825, the Defendant put in an award upon the matter touching which the action had been brought. The articles of agreement, however, which contained the submission, were signed in the first instance only by the Defendant *Salt*, and the Plaintiffs *Stead*, *Daker*, and *Jackson*. The time limited in them having expired without any thing being done, they were signed a second time with altered dates by *Stead*, who added the words, "for ourselves and partners, *William Wainwright*, *Isaac Sowden*."

One of several partners cannot bind the others by a submission to arbitration, even of matters arising out of the business of the firm.

It appearing that the Plaintiffs were not general partners, but partners only in the dealings to which the award referred, the learned judge thought the instrument of submission insufficient; and a verdict was taken for the Plaintiff, subject to an application to this Court to set it aside and enter a nonsuit, on the ground of the defect in the submission.

H 3

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Pell Serjt., obtained a rule *nisi* to this effect, on the ground that there was no difference between the incidents of a general partnership and a partnership in a particular transaction; — that a payment to one of several partners would operate as a discharge of a debt due to the whole firm; — that a release of such a debt, executed by one of several partners, would be valid against the others; as also a release of an action; — that an admission by one of several partners would be equally binding on the others; — that each partner had authority to act for the firm in all matters relating to the business carried on by them; — and that although an authority could not be implied to one of them to bind the others by a submission to arbitration on matters foreign to such business, (*Sandeland vs Marsh*), (a) yet a submission to arbitration on matters arising out of it, seemed to be as much within the scope of the partnership authority, and as necessary to its success, as the ordinary conduct of their trade.

Vaughan and *Wilde* Serjts. for the Plaintiffs relied on *Com. Dig. Arb. D. 2.* “If there be a controversy between *A.* of the one part, and *B.* and *C.* of the other, and *B.* submit for himself and *C.*, and there be an award that *B.* shall pay, this is good, though *C.* be a stranger. So if *B.* submit for himself and his partner;” from which they argued that *B.*’s having been holden singly liable, must have proceeded on the ground that his engagement did not bind his partner: they referred to *Strangford v. Greed* (b) as an authority to the same effect: urging that the executing a submission to refer to arbitration was not an act within the ordinary course of business, but a delegation of an authority, and that an award might call on the partners to perform acts which by law they could not be called on to perform; as to

(a) 2 B. & A. 673.

(b) 2 Mod. 228.

execute deeds, &c. That they could not revoke the authority which had been given, and, therefore ought not to be bound by it.

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Pell was heard in support of his rule, and the Court having taken time to consider, judgment was now delivered by

BEST C. J. The only question in this case was, whether the Plaintiffs were concluded by an award which had been made on the subject of the demand, to enforce which the action was brought. The plaintiffs are five in number, but the submission to the award was signed by no more than three of them, and the question is, whether a submission by the three will bind the five. The Court are of opinion that it will not bind them. It has been urged that a release by one of several partners will bind the others, and that is true, because, as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment. It has further been urged that the admission of one partner is binding on his fellows, this, however, is not exactly so; such an admission is evidence against all the partners, and as such evidence, it may affect them more or less, but it does not affect this case, for even in the case of a general partnership, one of the partners cannot bind the others without an authority express or implied, and an authority can only be implied for what is necessary to carry on the trade in which the partners are concerned. Now to enter into a submission for arbitration is no part of the ordinary business of a trading firm, and there is nothing in the present case to shew that either of the parties had authority to bind the others to such a submission. It is true that in *Strangford v. Greed*, the point now determined was not exactly in issue, but it was almost inseparably connected with the point which was there decided: it was laid down in that case

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that partner *A.* may engage for the performance of an agreement by his co-partner *B.*, and if *B.* fails to perform, it will be a breach of *A.*'s engagement; if it is a breach of *A.*'s engagement, it seems to be implied that *B.* was not jointly bound with him, for had he been bound, it would have been a breach of the engagement of both.

The language of *Comyn's Digest* is to the same effect. "If there be a controversy between *A.* of the one part, and *B.* and *C.* of the other, and *B.* submit for himself and *C.*, and there be an award that *B.* shall pay, this is good, though *C.* be a stranger." We should be sorry to establish a principle by which those who are concerned in joint contracts should be rendered more extensively liable than at present.

Rule discharged.

May 14.

THOMAS v. JACKSON.

To say of one who carries on the business of a corn vendor, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6*d.* a bushel than I bargained for," is actionable, and entitles him to a verdict without proof of special damage.

THE declaration stated, that the Defendant was a husbandman, and farmer of a certain large farm of arable and other lands, with the appurtenances, and a vendor of the corn by him raised and grown in and upon his said farm and lands, and carried on the business of a husbandman and vendor of corn with great integrity, and with the good opinion of his neighbours and other good subjects; and that the Defendant slandered him, by saying to him and of him, as such husbandman, farmer, and vendor of corn, in the presence and hearing of others, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6*d.* a bushel than I bargained for;" whereupon one *Marr*, who, before the speaking of the words, was about to make a purchase of the plaintiff, refused to do so. The Defendant pleaded the general issue, and justified

justified the charge of selling oats 6*d.* a bushel worse than those bargained for.

At the trial before *Bayley J.*, last *York* assizes, the Plaintiff proved the speaking of the words, as alleged in the declaration, but failed in establishing the existence of the special damage.

Whereupon the learned Judge told the jury, that unless special damage was proved the action could not be maintained; and that therefore they must find a verdict for the Defendant. But in order to save the parties the expence of coming to trial again, in case the Court above should dissent from his direction touching the special damage, they might also say what damage they thought the Plaintiff had sustained by the speaking of the words only.

The jury found a verdict for the Defendant, and said they could find no damages for the Plaintiff, "because he had not substantiated the charge."

Bosanquet Serjt. obtained a rule *nisi* to set aside this verdict and enter a verdict for the Plaintiff, or to allow him a new trial, on the ground that the words alleged in the declaration having been spoken of the Plaintiff in his business or calling of a corn vendor, were actionable, and entitled him to a verdict without proof of special damage.

Vaughan Serjt. shewed cause, but

The Court were clearly of opinion, that these words spoken of a corn-factor were actionable, without proof of special damage; and *Best C. J.* said, that such would be the case with any words which imputed to a man fraudulent conduct in the business whereby he gained his bread.

The rule, therefore, for a new trial was made absolute, unless the defendant consented within a week to allow a verdict to be entered for the Plaintiff with 40*s.* damages.

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v.
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May 14.

COLLIER v. JACOB.

An agreement to take tithes of wheat by one sheaf taken at varying intervals out of each of many shocks of ten, is not illegal.

THIS was an action on the stat. 2 & 3 *Edw. 6. c. 13.*, for improperly setting out the tithes of wheat.

At the trial at the last *Lent Bury* assizes, before *Gaselee J.*, certain witnesses whom the jury believed, stated that the Plaintiff had at a vestry agreed that the tithes should be taken in the following manner, viz. the sheaves were to be set up in shocks of ten each, and the Plaintiff was to have one sheaf out of each shock, taken by the Defendant at varying intervals; as, the first sheaf in the first shock, the second in the second shock, the third in the third shock; so that out of the sheaves in the field he was to take the first, the twelfth, the twenty-third, and so on.

Gaselee J. told the jury, that if they believed the Plaintiff had made this agreement, and that the Defendant had in consequence taken the trouble to set up shocks which he would not otherwise have done, they ought to find a verdict for the Defendant. This was done; and

Bosanquet Serjt., who had obtained a rule *nisi* for a new trial, on the ground that the verdict had been given against the weight of evidence, now contended, also, that this mode of tithing was illegal, and likely to lead to a fraud on the parson; that the parson had no right to select any particular sheaf, and that, therefore, it could not be allowed to the farmer to do so.

BEST C. J. Though I might have disbelieved witnesses who stated that a man had made an agreement

so prejudicial to his own interests as this must have been to the interest of the Plaintiff, the jury have believed them, and have confirmed the existence of the agreement, in which I think, in the way it was put to the jury by my Brother *Gaselee*, there was nothing illegal, although the mode of tithing adopted was more likely to lead to fraud than any I ever heard of.

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BURROUGH J. (a) The legal mode of tithing wheat is by the sheaf; but it is also very common, especially in the west of *England*, to tithe it by the shock; an agreement to which effect has here been given by the jury, without any imputation of fraud. The verdict, therefore, ought not to be disturbed.

GASELEE J. concurring, and adding that no fraud had been practised, the rule was

Discharged.

(a) *Park J.* had gone to Chambers.

MORLEY and Others v. BOOTHBY.

May 14.

SAME v. BOOTHBY and CLARKE.

THE Plaintiffs declared, that, in consideration that "Messrs. the said Plaintiffs, at the request of the said Defendants, would sell and deliver to certain persons using hereby promise that your draft on *William Clarke, Son, and Co.*, due at Messrs. *Mastermans'*, at six months, on the 27th of *November* next, shall be then paid out of money to be received from *St. Philip's church*, say amount 174*l.* 13*s.* 5*d.* — *W. Clarke, W. Boothby :*"

Held, that this undertaking was void within the statute of frauds, no consideration appearing for *Boothby's* promise.

the

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the style of *William Clarke, Son, and Co.*, certain goods, wares, and merchandises, of certain value, to wit, of the value of 174*l.* 13*s.* 5*d.*, to be used in and about building a certain church, to wit, *St. Phillip's church*, at *Sheffield*, in the county of *York*, to be paid for by a bill of exchange, to be drawn by the said Plaintiffs upon the said *William Clarke, Son, and Co.*, to be payable at a certain day then to come, to wit, at a day not earlier than the 27th day of *November* then next, the said Defendants undertook, and then and there faithfully promised the said Plaintiffs that the said bill should be paid when due out of such monies as the said Defendants should receive before the said bill should become due, for and on account of the building of the said church; and the said Plaintiffs aver that they, confiding in the said promise and undertaking of the said Defendants, did afterwards, to wit, on, &c., at, &c., sell and deliver to the said *William Clark, Son, and Co.* divers goods, wares and merchandises of the value aforesaid, to be used in and about the building of the said church, and did afterwards, to wit, on the 27th day of *May* in the year aforesaid, draw a certain bill for the said sum of money on the said *William Clarke, Son, and Co.*, payable to the order of the said Plaintiffs, at a certain day not sooner than the 27th of *November* in the year aforesaid, to wit, on the 30th day of the month last aforesaid; and the said *William Clarke, Son, and Co.* then and there duly accepted the said bill; and although the said bill afterwards, and when the same became due and payable, to wit, on the 30th day of *November* in the year aforesaid, in the county aforesaid, was duly presented for payment thereof; and although the same was then and there dishonored by the said *William Clarke, Son, and Co.*, the said acceptors thereof, of which said premises the said Defendants afterwards, to wit, on, &c., at, &c., had notice; and although the said Defendants received before

fore the bill became due, and from thence hitherto have had sufficient monies for and on account of the building the said church, to satisfy the said bill, yet the said Defendants, not regarding their said promise and undertaking, but contriving and intending to deceive and defraud the said Plaintiffs in this respect, have not, (although often requested so to do) guaranteed the payment of the said bill, or paid or caused to be paid the sum of money therein specified, or any part thereof to the said Plaintiffs.

There were various other counts, but all stating in substance the same undertaking.

The Defendants pleaded, that the supposed promise was a special promise to answer for the debt of other persons, to wit, the said persons using the style of *William Clarke, Son, and Co.*; and that no agreement in respect of or relating to the supposed cause of action, or any memorandum or note thereof, wherein the consideration for the said promise was stated or shewn, was, according to the form of the statute in such case made and provided, in writing or signed by the said Defendants, or by any other person or persons by them thereunto lawfully authorized. The Plaintiffs replied, that a certain agreement in respect of and relating to the said cause of action, wherein the consideration for the said promise was stated and shewn, was, according to the form of the statute in such case made and provided, made in writing and signed by the said Defendants, which said last mentioned agreement was and is to the effect following; that is to say,

“ Messrs. *Morley and Co.*

“ We hereby promise that your draft on *William Clarke, Son, and Co.* due at Messrs. *Masterman's* at six months, due on the 27th of *November* next, shall be then paid out of money to be received from
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 27th November.
 MORLEY " *Sheffield*, " We are, yours,
 v. " *May 26. 1824.*" *W. Clarke, W. Boothby.*"
 BOOTHBY.

And this the said Plaintiffs are ready to verify.

Demurrer, assigning for cause, that the supposed agreements in writing mentioned in the replications, do not state or shew, according to the form of the statute in such case made and provided, any such considerations or consideration for the promises or promise as in and by the declaration are alleged to have been the considerations of such promises respectively; and also for that the supposed agreements in the said replications mentioned, do not, according to the form of the statute in such case made and provided, state or shew any considerations or consideration for the promises mentioned and set forth in the declaration, or for any or either of those promises. Joinder in demurrer.

The action against *Boothby* alone was upon an undertaking in substance the same as the above, and the pleadings were framed accordingly.

Onslow Serjt., in support of the demurrer, relied on *Wain v. Walters* (a), *Lyon v. Lamb* (b), *Saunders v. Wakefield* (c), and *Jenkins v. Reynolds* (d), and contended that no consideration for the Defendants' promise appeared on the face of these instruments, the language respecting *St. Philip's Church* not being intelligible without recourse to oral testimony, which it was the express object of the statute of frauds to exclude.

Pell Serjt. contra said, that, admitting the correctness of the principle laid down in *Wain v. Walters*, there had

(a) 5 *East*, 10.

(b) *Fell. Merc. Guar.* 260.

(c) 4 *B. & A.* 595.

(d) 3 *B. & A.* 14.

always

always been much indecision in the application of it, as it frequently led to great injustice, and promoted breach of faith. He referred to the language of *Dallas C. J.* in *Pace v. Marsh (a)*—“ These cases ought not to be encouraged beyond what the law strictly warrants; because parties too frequently by entering into such engagements occasion extensive credit to be given, and then get out of their obligation in any way they can;”—and to the disapprobation expressed by the Chancellor in *Ex parte Minet (b)* on the subject of the doctrine laid down in *Wain v. Walters*. A very slight indication of the consideration for the Defendants’ promise had been holden sufficient; and the case of *Boehm v. Campbell (c)*, where the guarantee was sustained, could not be distinguished from the present, in which, from the date of the guarantee, and the language of the bills, the consideration was sufficiently connected with the building of the church.

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Onslow replied, that *Boehm v. Campbell* was anterior to *Saunders v. Wakefield* and *Jenkins v. Reynolds*, and that the consideration in that case was more apparent than in the present.

Cur. adv. vult.

BEST C. J. now delivered the judgment of the Court, and after stating the pleadings, and observing, that though a sufficient consideration for the Defendants’ promise was stated in the declarations, the instruments set out in the replications did not contain any proof of the averments in the declarations,—said, —

The common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were

(a) 1 *Bingb.* 216.

(b) 14 *Ves.* jun. 190.

(c) 3 *B. M.* 15.

about

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about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it. In all other cases the contract was invalid, unless the party making the promise was to obtain some advantage, or the party to whom it was made, was to suffer some inconvenience in consequence of the one making, or the other accepting such promise.

If the contract was oral, the benefit or inconvenience, as well as the other parts of the contract, could only be proved by parol testimony. When the contract was reduced to writing, it was required not only that the obligatory part, but that the inducement or consideration should also be in writing, because it was always a rule in the law of evidence, that no parol testimony could be admitted, either to supply the defects, or explain the contents of a written instrument. If the writing did not prove the consideration, it could not be proved in any other manner, and thus the contract failed, because the consideration, without which it was altogether inoperative, could not be shewn. When the statute of frauds declared that no person should be charged with the debt of another except on an agreement in writing; if the clause in the statute had not expressed (as I think it does) that the *whole* agreement should be in writing, the law of evidence would have rendered it necessary the whole should have been in writing, by declaring, as it uniformly has done, that nothing could be added to the terms expressed in writing by parol testimony. Applying the principles of common law to the statute, which is a safe mode of construing acts of the legislature, I say, as I said in *Saunders v. Wakefield*, that if I had never heard of *Wain v. Walters* I should have held, that a consideration must appear on the face of the written instrument. It must also occur to any one, that to attain the avowed object
of

of the statute of frauds (namely, the prevention of perjury), it is more necessary to require that the consideration of a bargain should appear in writing, than any other term or condition of it. That the consideration should appear on the instrument, not in any set formal terms, but with clearness enough for the courts to judge of its sufficiency, is now fully established by *Wain v. Walters*, and *Saunders v. Wakefield*, in the King's Bench, and *Jenkins v. Reynolds*, in this Court.

The present Lord Chancellor is reported to have expressed himself, in *ex parte Minet*, dissatisfied with the judgment of *Wain v. Walters*. I think his Lordship must have been mistaken by the reporter, who has made the Chancellor say, "The undertaking of one man for the debts of another does not require a consideration moving between them." No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guaranty. It is enough if the person for whom the guarantor becomes surety has benefit, or the person to whom the guaranty is given suffer inconvenience, as an inducement to the surety to become guaranty for the principal debtor.

The Chancellor did not decide this point in that case. In *ex parte Gardom (a)*, this question came again before the Chancellor, and his Lordship again expressed his dissatisfaction at *Wain v. Walters*, but his judgment is not in opposition to the authority of that case. The judgment of the Chancellor was, that there was a sufficient consideration expressed in the guarantee.

I must observe, that *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, have been decided by the King's Bench and the Common Pleas, since the cases in equity.

(a) 15 Ves. jun. 288.

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In the cases of *Boehm v. Campbell*, and *Pace v. Marsh*, this Court did not mean to over-rule them, but gave their judgments on the ground that there was a sufficient consideration expressed on the written instruments. In both those cases a by-gone consideration was expressed on the guarantees; whether such consideration was sufficient, it is not now material to inquire, because in the instruments set in these declarations there are neither past nor future considerations. It does not appear that the credits which had previously been given to the original debtors were excused in consequence of those guarantees. When the bills which had been given were at maturity, the debtors could be sued as well after as before the giving of the guarantees. The debtors had no benefit, nor did the creditors put themselves to any inconvenience in consequence of the execution of those instruments. Although one of the papers speaks of money for *St. Phillip's* church, it does not appear that the persons subscribing such paper had any thing to do with any such money. The replications setting forth these guarantees do not support the declaration, and we are of opinion there must be judgment for the defendants.

Judgment for the Defendants accordingly.

1825.

LIVETT v. WILSON.

May 16.

TRESPASS for breaking and entering the Plaintiff's close, called the yard, in the parish of *St. Andrew*, in the town of *Cambridge*.

The Defendant pleaded that before and at the said several times when, &c., he was seized in his demesne as of fee of and in a certain messuage and yard in the parish aforesaid, and that long before any of the several times, when, &c., to wit, on the 1st *January* 1764, at the parish aforesaid, by a certain deed then and there made between *John Waterfield*, the then owner of the said close of Plaintiff called the yard, and who was then seized thereof in his demesne as of fee, and *Thomas Blanks* and *Mary* his wife, who were then seized in their demesne as of fee, in right of the said *Mary*, of and in the messuage and yard, now of Defendant, and whose estates therein he, Defendant, now hath, but which said last-mentioned deed hath since been lost and destroyed by accident, and, therefore, cannot be produced to the Court here, and the date whereof is for that reason wholly unknown to Defendant, the said *John Waterfield* so being owner of the said close, in which, &c., did grant to the said *Thomas Blanks* and *Mary* his wife, in right of the said *Mary*, so then being the owner of the said messuage and yard, now of Defendant, and to the heirs and assigns of the said *Mary* as aforesaid, a certain way from the public highway or street called the *Petty Cury*, into, through, over, and along the said close called the yard, in which, &c., unto and into the said messuage and yard of Defendant, and so back again from the said last mentioned close into, through, over, and along the said

Defendant pleaded a grant of right of way by deed, subsequently lost. Plaintiff, in his replication, traversed the grant. At the trial, there being conflicting testimony as to the uninterrupted user of the way, the Judge directed the jury, that if upon this issue they thought Defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the Defendant; if they thought there had been no way granted by deed, they would find for the Plaintiff:

Held, that this direction was right.

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close, in which, &c., called the yard, unto and into the said public king's highway to go, return, pass, and re-pass on foot in and along the said last mentioned way at seasonable hours in the day time.

The Plaintiff replied, that the said *John Waterfield* so being owner of the said close, in which, &c., did not grant to the said *Thomas Blanks* and *Mary* his wife, in right of the said *Mary*, being the owners of the said messuage and yard, now of Defendant, a certain way to pass on foot from the said public highway or street called the *Petty Cury*, into, through, over, and along the said close called the yard, in which, &c.

Upon this replication issue was taken, and there was also a new assignment, upon which judgment was suffered by *nil dicit*. At the trial before *Gaselee J.* at the last *Cambridge* assizes, it appeared that the premises occupied by the Plaintiff and Defendant adjoined each other, and were formerly in the hands of a single owner who divided them in the year 1734, by a conveyance of part to a person under whom the Defendant claimed, but the right of way now asserted was not reserved in that conveyance. As to the undisputed use of the way, there was conflicting testimony, but the weight of evidence showed that the alleged right had been pretty constantly contested, and the Defendant upon recently taking some adjacent premises the approach to which was by the entrance he claimed into the yard, said, "My right of way from the street to the yard can now no longer be resisted."

GASELEE J. referred to *Doe d. Fenwick v. Read* (a) and told the jury that if upon this issue they thought the Defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed,

(a) 5 B. & A. 232.

and

and that that deed had been lost, they would find a verdict for the Defendant; if they thought there had been no way granted by deed, they would find for the Plaintiff.

The jury said they could not find any deed, and gave a verdict for the Plaintiff.

Taddy Serjt. obtained a rule *nisi* for a new trial upon an objection to this direction, against which rule *Wilde* Serjt. was to have shewn cause, but the Court stopped him, and called on *Taddy* to support his-rule. He contended that the jury ought to have been told, that if they thought the way had been used uninterruptedly for a sufficient length of time, they might from that circumstance presume a deed; and he referred to *Campbell v. Wilson (a)*, where it was holden that upon an uninterrupted use for twenty years the jury might presume a grant. In *Doe d. Fenwick v. Read* the commencement of the Defendant's title appeared, and as that title was not sufficient unless confirmed by a subsequent conveyance, the jury were properly directed to consider whether or not any such conveyance had been made; but even in that case *Holroyd J.* said, "In cases of rights of way the original enjoyment cannot be accounted for, unless a grant has been made, and therefore it is that from long enjoyment such grants are presumed." In *Holcroft v. Heel (b)*, where the grantee of a market had suffered another to erect another market in his neighbourhood, and use it without interruption for above twenty years, *Eyre C. J.* thought it was a bar to an action on the case for a disturbance of the franchise, though it was clear that the user originated without any rightful authority. Therefore, where there has been a user adverse to the

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LIVETT
v.
WILSON.

(a) 3 East, 294.

(b) 1 B. & P. 400.

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Plaintiff, it is not for a jury to find a deed, but for the judge to direct them whether or not the facts are sufficient to authorize them to presume one.

BEST C. J. I think that the direction of the learned Judge was perfectly right, and that he went far enough. I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case a Judge would not be justified in saying that they must, but that they may presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly. In the present case the way which was pleaded had not been reserved by the deed under which the premises to which it was said to be long were separated from the Plaintiff's premises; the user, so far from having been uninterrupted, had almost always been the subject of contest; and the expression employed by the Defendant upon acquiring a way to the premises recently taken, showed that he was distrustful of his claim before.

PARK J. Nothing but uninterrupted usage can raise a presumption of a grant; here the usage was always interrupted, and the learned Judge's charge was perfectly correct.

BURROUGH J. The charge to the jury was so proper that I shall adopt it for the future. It was of the essence of the plea and replication that the jury should enquire whether or not the deed stated in the plea ever had existence. If there had been such a deed it is not probable the usage of the way would have been constantly disputed, as it appears to have been according to the
evidence

evidence at the trial. There is no ground for wishing to alter the verdict of the jury, and the Defendant's rule must be

Discharged.

1825.
 LIVETT
 v.
 WILSON.

COLLEDGE v. HORN.

May 16.

THIS was an action to recover money alleged to be due from the Defendant to the Plaintiff. The Defendant pleaded the statute of limitations; and as to a part of the demand, proposed at the trial before the Chief Baron, at the last *Hertford* assizes, to prove an admission made in the presence of the Plaintiff, by the Plaintiff's counsel, in his opening address to the jury on a former trial; when, however, the witness, who was called to prove this admission, was asked "what was said by the counsel for the Plaintiff," the learned Chief Baron prohibited the witness from answering, and rejected the evidence.

In answer to the plea of the statute of limitations, the Plaintiff gave in evidence the following letter from the Defendant to the Plaintiff's attorney.

" Sir,

" I this day received yours respecting Mr. *Thomas Colledge's* demand; it is not a just one. I am ready to

any thing like that sum; shall be happy to settle the difference by his meeting me:" Held, that the Judge was justified in directing the jury, " that after this letter the statute of limitations was out of the question."

Per Burrough J. A statement made by a counsel upon his address to the jury, but in the hearing of his client, is binding on the client if he makes no objection.

The following letter from the Defendant to Plaintiff's attorney, was given in evidence by a Plaintiff in answer to a plea of the statute of limitations. " I have received your's respecting Plaintiff's demand; it is not a just one; I am ready to settle the account whenever Plaintiff thinks proper to meet on the business; I am not in his debt *qol.*, nor

settle

1826.
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 v.
 HORN.

settle the account whenever Mr. *T. C.* thinks proper to meet on the business. I am not in his debt 90*l.*, nor any thing like that sum: shall be happy to settle the difference, by his meeting me in *London*, or at my house.

“ Yours,

“ *January 10, 1820.*

“ *Geo. Horn.*

“ I shall write Mr. *Colledge* on the subject.”

The learned Judge told the jury, that after this letter the statute of limitations was 'out of the question, and a verdict was thereupon found for the Plaintiff.

Vaughan Serjt., objecting that the learned Judge ought to have left it to the jury to determine whether or not this letter was an acknowledgment of any existing demand, and particularly whether it applied to the demand on which the action was brought, instead of taking upon himself to decide, that after the letter the statute was out of the question, — and objecting that evidence of the admission by the Plaintiff's counsel ought not to have been rejected, — obtained a rule *nisi* for a new trial.

Upon reading the Judge's notes it did not appear; nor could it be distinctly ascertained in what part of the court the Plaintiff stood at the former trial, when the alleged admission was made by his counsel, nor whether he was within hearing of what was said.

Taddy Serjt., however, who shewed cause, insisted, that whatever might be the law as to admissions which were formally made and taken down in the Judge's notes as part of the Plaintiff's case, under no circumstances could evidence be given, as against the client, of statements made by his counsel in the course of an address

address to the jury. These statements were often no other than the embellishments of the imagination; or, at all events, so mixed up with such embellishments as not to be easily distinguishable from them. The statements contained in a bill in equity were not evidence against the party who filed the bill, solely on the ground that they were supposed to be the suggestions of counsel.

As to the language used by the Judge touching the defendant's letter, it had no such object as that of superseding the functions of the jury, and amounted to no more than leaving the consideration of the letter to them, accompanied with a strong expression of his own opinion.

Vaughan and *Wilde* Serjts., in support of the rule, insisted that the Defendant's letter had not been sufficiently left to the jury, as it ought to have been, *Frost v. Bengough* (a), and that it contained no admission of any demand. *Rowcroft v. Lomas* (b), *Hellings v. Shaw* (c), *Beale v. Nind*. (d)

That if the declarations of an agent were admissible in evidence against his principal, there could be no reason for excluding the evidence of counsel. [Best C. J. I cannot allow that the counsel is the agent of the party.] At all events, the witness upon the present occasion was stopped too soon, and before he was rejected ought to have been permitted at least to have shewn the circumstances under which the alleged admission was made.

BEST C. J. With respect to the statute of limitations none of us entertain any doubt. In effect, the consider-

(a) 1 Bing. 266.

(b) 4 M. & S. 457.

(c) 7 Taunt. 608.

(d) 4 B. & A. 562.

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 COLLEDGE
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ation of the Defendant's letter was left to the jury, though with a strong observation from the learned Judge, which was well warranted, because upon the face of the letter there is a clear admission of an existing cause of action. If it had been simply left to the jury to say whether or not this letter took the Plaintiff's case out of the statute of limitations, and the jury had found for the Defendant, we must have granted a new trial.

The other question is one of great difficulty, and I avoid saying any thing on it till we have all the facts fully before us; at present it does not appear whether or not the Plaintiff was within hearing of the statement made by his counsel, or how far that statement was authorised.

PARK J. Even if there had been an omission to leave the Defendant's letter to the consideration of the jury, yet if no possible doubt arises on the construction of it, that omission would be no ground for granting a new trial.

Upon the other question there must be a new trial to ascertain the facts; till they are known, I abstain from coming to any conclusion on the subject.

BURROUGH J. Where a letter is so clear as this, a judge is justified in telling the jury it is an admission of a debt. Upon the other question, I see no difficulty at all; parties are every day bound by the acts and declarations of their counsel; if the Plaintiff was in court, heard what his counsel said, and made no objection, I think he was bound.

GASELEE J. There is nothing in the question upon the statute of limitations. Upon the other question I
 forbear

forbear to give any opinion under the present imperfect statement.

The rule for a new trial was then made absolute, with an agreement to discharge it if the Plaintiff would consent to accept 36% in full of his demand.

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COLLEDGE

v.

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END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

1825.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the Sixth Year of the Reign of GEORGE IV.

JONES v. DE LISLE.

June 3.

TADDY Serjt., upon an affidavit showing that a writ of error in this case had been sued out expressly for delay, and that the Defendant had fled to *Paris*, moved for a rule *nisi* to set aside the allowance of the writ, over which allowance, as being the act of the Court, the Court, he insisted, might exercise its discretion. The Court will not interfere with the allowance of a writ of error.

Sed per Curiam. We cannot interfere. If the writ has been improperly sued out, you may move against the attorney,— apply to Chancery, whence the writ issues,— or move to proceed with execution notwithstanding;— but the officer of this Court is bound to

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allow

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allow the writ, and might be attached if he refused. Such a motion was never made before.

Taddy not finding it expedient, under the circumstances of the case, to move to issue execution notwithstanding the writ of error,

Took nothing.

June 4.

BARNARD v. NEVILLE.

Affidavit to hold to bail on the ground that Defendant was indebted to Plaintiff in trust for Defendant, under a deed by which the Defendant had covenanted to pay "at certain times and on certain events now past and happened:" Held, sufficient.

THE affidavit to hold to bail stated that the Defendant was indebted to the Plaintiff in trust for the deponent, under a deed by which the Defendant had covenanted to pay, "at certain times, and on certain events now past and happened."

Pell Serjt. moved to discharge the Defendant on filing a common appearance, on the ground that this affidavit was not sufficiently explicit; that perjury could not be assigned on it; and that, for aught that appeared, the consideration for the debt, and the whole transaction, might be illegal. He cited the language of *Le Blanc J.* in *Bosanquet v. Fillis* (a) to show that in such a case breaches ought to be assigned, and that it should appear the Plaintiff was damnified.

BEST C.J. We think this affidavit sufficiently certain; it states a deed under which a debt was to accrue at certain times, and on certain events, and it alleges that those times and events have passed and happened. If

(a) 4 M. & S. 330.

They have not, the deponent may be indicted for perjury. The case which has been referred to was very different, for there it was left to the Court to infer that a debt might be due; here it is expressly stated that a debt is due. As to the possible illegality of the consideration, that is a matter to be pleaded or proved if it exists, but not decided summarily on motion.

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NEVILLE.

PARK J. The consideration is never stated in affidavits to hold to bail on bills of exchange, and there is no reason for requiring it in a case like the present.

BURROUGH J. If we acceded to this motion, affidavits to hold to bail must be made as long as declarations.

GASELEE J. concurred, and *Pell*

Took nothing.

HOULISTON v. SMYTH.

June 7.

ASSUMPSIT to recover against the husband 17l. for board and lodging provided for his wife by the Plaintiff, from the 18th of *May* to the 13th of *July* 1824.

Where a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessaries furnished for her support.

At the trial before *Best C. J.*, *Middlesex* sittings after *Easter* term last, it appeared that the Defendant having treated his wife with unusual cruelty, she had quitted him under the apprehension of further violence, and had taken refuge with the Plaintiff. Among other facts, it was proved that the Defendant, sanctioned by the opinion of a young medical man, had, in 1823, confined

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 SMYTH.

his wife in a mad-house, although she was perfectly sane, and was afterwards released under a *habeas corpus*. She then returned to her husband, and the immediate occasion of her flight to the Plaintiff's was personal violence on the part of her husband, he having struck her with his fist in the face, having threatened her with a pistol, and with another confinement in the mad-house.

On the part of the Defendant it was proposed to shew that in *December* 1824, the ecclesiastical court had, in a suit for a divorce, decreed the Defendant's wife alimony from the 8th of *May* preceding; and also that about two years previously to the trial she had committed adultery. The Chief Justice, however, dismissed these two grounds of defence, as affording no answer to the action; the alimony not having been decreed till some months after the period of the Plaintiff's claim, and the Defendant having received his wife again after the commission of the alleged adultery; and he directed the jury that if they thought the Defendant's wife had left his house with reasonable grounds for apprehending personal violence, she was entitled, wherever she went, to credit for her support.

The jury having found a verdict for the Plaintiff with 17*l.* damages,

Vaughan Serjt. moved for a rule *nisi* for a new trial, on the ground that the jury had been mis-directed; he urged that no case had gone so far as to decide that the wife was entitled to credit if she left her husband upon a mere apprehension of violence. In *Horwood v. Heffer* (a) *Mansfield* C. J. said, "Nothing short of actual terror and violence will support this action." And *Lawrence* J. thought the circumstance of a pro-

(a) 3 *Taunt.* 421.

stitute being placed at the husband's table not sufficient to justify the wife's departure, so long as she could obtain support in his house.

If mere apprehension of violence were sufficient to authorize such a course, a fantastic woman might elope without any just cause of complaint, or upon fear of that degree of chastisement which the law allowed.

Then the alimony which had been decreed to the Defendant's wife had relation back to a period anterior to the Plaintiff's claim; and if he could recover in this action, she would have the credit obtained against her husband, as well as her alimony.

With respect to the adultery, it might be that the husband upon receiving his wife again knew nothing of it, and in that case he would be discharged from any claim upon her subsequently quitting his roof.

BEST C. J. There is not the least pretence for this motion; the only ground on which a new trial can be asked for is a supposed mis-direction on my part. I told the jury that if they were of opinion the Defendant's wife had reasonable ground to apprehend personal violence, she was justified in leaving her husband; that the man who received and supported her under such circumstances acted like a Christian, and in a Christian country was entitled to compensation. I am still of that opinion, and it is warranted even by the case of *Horwood v. Heffer*; for *Lawrence J.* says, "You did not state any apprehension of her personal safety;" from which it may be inferred that if evidence had been adduced of such apprehension, the decision of the Court would have been the other way. But a woman is not bound to wait till actual violence is committed, and if she has reasonable ground for apprehending danger, may fly from the presence of her husband. It has been objected, that the establishment of this principle may lead fanciful women to quit their homes without suffi-

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cient reason. The apprehension, however, is not to be merely such as a fanciful woman may entertain, but such as a jury shall esteem to have been felt upon reasonable grounds. It was put to the jury in the present case, whether *they* thought the woman had reasonable ground for apprehending personal violence. The jury were warranted in concluding she apprehended a repetition of the violence offered to her the year preceding; and more horrid treatment no female had ever experienced. If I had recollected the cases decided by Lord *Ellenborough*, I should have decided, even at *Nisi Prius*, against the case of *Horwood v. Heffer*. The doctrine in that case cannot be law. Is a decent woman to stay under the same roof with a prostitute? to sit at the same table with her? or to give place, and receive her meals in a separate apartment? The law can never require any woman to act contrary to decency:— If a wife remains in the house with her husband and an adulteress, I doubt whether she could afterwards obtain a divorce for the adultery of her husband; her continuance in the house with her husband under such circumstances, might be considered as an assent to his conduct, and prejudice her case in the Spiritual Court.

As to the act of adultery which has been imputed in this case to the Defendant's wife, it can be no defence to an action arising out of transactions subsequent to her return to, and reception by her husband. In order to render adultery on the part of the wife a defence for the husband in an action like the present, she ought to be repudiated at the time of the adultery, and not received again.

The alimony was not decreed till many months after the flight of the Defendant's wife, so that she must have starved if the husband were not holden liable for her support in the mean time.

PARK J. There is no ground whatever for interfering with this verdict. The direction to the jury was

perfectly correct, and the true question was, whether the conduct of the Defendant was such as to occasion on the part of his wife a reasonable and strong apprehension of personal violence. From what had passed before, she had a reasonable ground for apprehending such violence, and the jury have drawn the proper conclusion. I am surprised at the language ascribed to the Court in *Horwood v. Heffer*, because it is abhorrent from every feeling of a man and a Christian. It is not to be endured that the mistress of a house should confine herself to a chamber with bare necessaries, when a prostitute is sitting at the same table with her husband. That cannot be the law of *England*, because it is not the law of morality and religion.

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BURROUGH J. It is not necessary for us to consider the case of *Horwood v. Heffer*: the only question here is, whether there was evidence at the trial from which the jury might presume the wife had a reasonable ground to apprehend personal violence. I am of opinion there was enough to warrant this, and that the verdict ought not to be disturbed.

GASELEE J. It is not necessary for us to enquire now what species of violence will justify a wife in leaving her husband's house, for it is impossible to doubt that the improperly confining her in a madhouse, is of itself a sufficient cause. It was for the jury to say whether or not a reasonable ground of apprehension existed, and they having found the fact, I do not feel myself called upon to give any opinion on the case of *Horwood v. Heffer*. I have always considered the law on this subject to be as laid down by Lord *Kenyon*, that if a man renders his house unfit for a modest woman to continue in it, she is authorised in going away.

Rule refused.

1825.

June 7.

ABBOTT v. RICE.

Where an attorney, without a regular authority from the Plaintiff, commenced an action of replevin, and the Plaintiff, knowing of the proceedings, suffered the cause to be carried down to trial, but afterwards, concerting with the Defendant, entered up satisfaction on the record without securing the attorney his costs, the Court refused to vacate the entry of satisfaction.

THE Plaintiff was the occupier of a farm which had been mortgaged to the Defendant. There being also a subsequent mortgage of the same property, the Defendant was appointed receiver of the rents. *John Mills*, who claimed under the second mortgage, and under a purchase of the equity of redemption from the mortgagor, came to an account with the Defendant, promised to pay him the amount of his claim on the property, caused his authority as receiver to be revoked, and gave the Plaintiff notice to pay rent to him, *Mills*. *Mills* having failed to discharge the Defendant's claim, the Defendant in August 1823 (having been for some time preceding in receipt of the rents), distrained for an arrear which he had allowed to accumulate under the expectation that *Mills* would have discharged all the incumbrances on the property.

Mills and his attorney then sent for the Plaintiff, and having, under a promise of indemnity, induced him to sign a replevin bond, which they themselves also executed as his sureties, commenced in the plaintiff's name, an action of replevin against the Defendant.

The Defendant upon applying to the Plaintiff found that he was not aware of the nature of the instrument he had signed, and had no intention of prosecuting a replevin.

The Plaintiff and Defendant then concerted measures for terminating the proceedings, and obtained a judge's order for transferring the papers in the action from *Mills's* attorney to Plaintiff's attorney, upon paying *Mills's* attorney his costs up to that time.

These

These costs not having been paid, the order was rescinded, and *Mills's* attorney having received no further notice from the Plaintiff, proceeded to trial.

At the trial the Defendant put in an admission by the Plaintiff (signed just before the cause was called on), that the Plaintiff held the premises as tenant to the Defendant; and the judge who presided having left it to the jury to decide whether or not this admission had been executed fraudulently and with a view to deprive *Mills's* attorney of his costs, the jury found a verdict for the Plaintiff.

The Plaintiff then, without communicating with *Mills's* attorney, caused an entry of satisfaction to be made on the record.

The foregoing facts appeared in affidavits made by *Mills* and his attorney on the one side, and the Plaintiff and Defendant on the other; the Plaintiff, further, expressly denying that he had ever given *Mills's* attorney any authority to commence a suit; affirming that *Mills* and his attorney had omitted to give him any indemnity; that, therefore, he and the Defendant had, without fraud, concerted measures to terminate the action as quickly as possible; the Plaintiff never having had any intention to contest the Defendant's title, and having told *Mills's* attorney's agent that he would not allow the proceeding.

Wilde Serjt. having upon the affidavit of *Mills* and his attorney, obtained a rule *nisi* for vacating with costs the entry of satisfaction on the judgment roll, upon the ground that the Plaintiff and Defendant had colluded together to deprive *Mills's* attorney of costs to which he was fairly entitled,

Spankie Serjt. now shewed cause, and relied on the fact that *Mills's* attorney had never any authority for commencing the suit.

Wilde,

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v.

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Wilde, however, urged, that the suit must be deemed to have been carried on with the Plaintiff's concurrence, inasmuch as it appeared that though he was fully aware of the proceedings, he never interfered to prevent *Mills's* attorney from carrying the cause down to trial. The case, therefore, fell within the principle of *Payne v. Rogers* (a) and *Hickey v. Bart* (b), and the Court would interfere for the protection of its officer.

BEST C.J. Notwithstanding the case of *Payne v. Rogers*, which goes a long way, I doubt the power of the Court to follow up the blow they are now called upon to strike; for if we were to set aside the entry of satisfaction, and execution were thereupon to issue, could we grant an attachment against the Plaintiff if he chose to discharge the goods in the hands of the sheriff? But the ground of my decision in the present instance, is, that if an attorney will sue for a tenant against his landlord, he ought to make it appear distinctly that he had authority for his proceeding, and that the tenant knew what he was about. This Court should always require that, in a case like the present, the tenant should receive an indemnity on the one hand, and sign a contract in writing on the other, not to release the action, in which case, should he afterwards violate his engagement, he might be sued by the party aggrieved. If an attorney calls on the Court to interfere summarily against an individual who has deprived him of his costs by entering satisfaction on record, he must make it distinctly appear that every thing has been rightly done. That does not appear in the present case; but as both parties are to blame, the rule must be

Discharged without costs.

(a) *Doug.* 407.

(b) 7 *Taunt.* 48.

1825.

WEATHRELL v. HOWARD.

June 8.

THE Plaintiff declared in trespass for an assault and battery with a tearing of clothes; the Defendant pleaded that he was not guilty of the said supposed assaults in manner and form as the said Plaintiff above thereof complained against him. At the trial at the last *Kent* assizes, it appearing that the Defendant had only collared and shaken the Plaintiff, the jury found a verdict with 20s. damages. Nothing was said about costs, nor did the judge certify that a battery had been proved.

The associate entered on the *postea* 20s. damages and 20s. costs, but under some misapprehension as to the supposed admission of a battery on the pleadings, he afterwards altered the 20s. costs unto 40s.

Judgment for increased costs having thereupon been signed by the Plaintiff,

Declaration for assault, battery, and tearing clothes.

Plea, that Defendant was not guilty of the said supposed assaults in manner and form as the Plaintiff complained :

Held, that the *modo et forma* included a denial of the battery and laceravit, as well as the assault.

Wilde Serjt. last term obtained a rule *nisi* for setting aside so much of the payment as related to increased costs, — for restoring the indorsement in the *postea*, — and for the prothonotary to be at liberty to review his taxation of costs. He relied on *Mears v. Greenaway* (a) and *Lockwood v. Stannard*. (b)

Vaughan and *Laves* Serjts., who shewed cause, contended that the plea only mentioning the assaults, there was an admission of the battery and laceravit, and that, therefore, a judge's certificate was not necessary to entitle the Plaintiff to his increased costs, though the damages were under 40s. (c)

(a) 1 *H. Bl.* 291.(c) *Vide* 22 & 23 *Car. 2.* c. 9.(b) 5 *T. R.* 482.

For

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v.

HOWARD.

For the Defendant it was observed, that the battery and *laceravit* must have formed parcel of the assault, even in the estimation of the Plaintiff, as he had joined issue on the plea, and had made no award of enquiry of damages for the *laceravit*.

The Court were of opinion, that the plea denying the assault had been made *in manner and form* as alleged by the Plaintiff, contained in substance a denial of the battery and *laceravit*. And they made the rule

Absolute.

June 8.

SPOONER v. BREWSTER.

Though the freehold of the church-yard is in the parson, trespass lies for the erector of a tombstone against a person who wrongfully removes it from the church-yard and erases the inscription.

TRESPASS for seizing, cutting, damaging, and destroying divers tombstones and gravestones of the Plaintiff, and with chisels and other instruments cutting out and erasing therefrom divers inscriptions, letters, and figures of the Plaintiff, and taking and carrying away the same stones, and converting them to Defendant's own use.

Plea, general issue.

At the trial before *Best C. J. Middlesex* sittings after last *Easter* term, it appeared that one *Gravenor* had in 1815 married the daughter of the Plaintiff, who having been convicted of purchasing government stores, was then undergoing sentence of transportation in *New South Wales*. Mrs. *Gravenor* died in 1816, when the Plaintiff being still abroad and under sentence, his wife erected and paid for a tombstone to her daughter in *Bethnal Green* church-yard, and some little time after caused to be inscribed upon the stone, the words "The family grave

grave of *John and Sarah Spooner*." In January 1825 the Defendant (by direction of *Gravenor* who had paid for the grave) took up the tombstone, and immediately conveyed it to his workshop. While he was in the act of removing the stone he received a prohibition from the Plaintiff, whose consent had been asked and refused; and after the stone had been removed from the church-yard, notice was given him by the Plaintiff not to alter it; this notice he promised to observe, but subsequently said he was indemnified, and would alter it: he then obliterated the words "*The family grave of John and Sarah Spooner*," and added the record of the death of *Gravenor's* two children.

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 v.
 BREWSTER.

It was objected on the part of the Defendant that the freehold of the church-yard being in the parson, the Plaintiff could not maintain trespass for what the Defendant had done.

A verdict, however, was found for the Plaintiff, with leave for the Defendant to move to enter a nonsuit instead.

Wilde Serjt., who moved accordingly, cited in support of the objection urged on the trial *Com. Dig. Esglise G. 1. 2 Roll. Abr. 337. Corven's case (a) Frances v. Ley (b)*, and *Com. Dig. action on the case for misfeasance, A. 6.*, to show that the remedy was by case and not by trespass, even where the parson had improperly removed ornaments placed in the church in honor of persons interred there. In *Godbolt 200*, where it was said trespass would lie against the parson under such circumstances, a reference was made to the year book, which did not warrant the position. [*Best C. J. In Dawtrie v. Dee (c)*] it was holden that the owner of a pew might maintain trespass for breaking it. But in the present case the erasure seems to have been a distinct act of trespass

(a) 12 Rep. 105.

(b) Cro. Jac. 367.

(c) 2 Roll. Rep. 140. Palm, 46.

after

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after the removal of the stone:] That will not assist the Plaintiff, for the taking up, the removal, and the erasure constituted one continued act, and the property and possession of the tombstone never reverted to the plaintiff. In the severance by a thief of things fixed to the freehold, the thing severed is not deemed a chattel so as to render the taking of it felonious, unless an interval elapse between the severance and removal.

The Court took time to consider, and now

BEST C. J. said (*a*), There is no doubt that some action may be maintained for the injury of which the Plaintiff complains. Lord Coke says, the parson in such a case "is subject to an action to the heir" (*b*); but this passage does not state what form of action is to be adopted. The observance of forms is indeed material for the purposes of justice, but upon consideration we are all of opinion that the form which has been chosen in the present instance is right. There are many authorities which shew that the heir may maintain an action in cases of this kind: so also the owner of a pew for violations of the right to enjoy it. In general that right is conferred by the ordinary, and case is the remedy for a mere obstruction; but in *Dawtrie v. Dee* it is said, if the pew itself which the party has put up, be broken, trespass lies. That case has, I understand, been somewhere doubted, but I think it consistent with law and good sense, and it agrees with the decisions in 9 *Ed.* 4. 14. 8. In *Moore* 878., Lady Grey's case is cited, and trespass said to be the proper form.

In a case like the present, where it is clear some action is maintainable, one instance is sufficient to decide the form. As to the cases of felony the distinctions *in favorem vitæ* are exceedingly nice, but even in those

(*a*) The reporter was absent when this judgment was delivered, and is indebted for it to a gentleman at the bar.

(*b*) *Co. Litt.* 186.

cases a slight interval between severance and removal, will make the thing removed a chattel. The Defendant here subsequently to the removal of the stone, was cautioned not to obliterate the inscription, and he promised to abstain from doing so; but afterwards, saying he was indemnified, effected the erasure complained of. It has been urged that the freehold of the churchyard is in the parson; that is undoubtedly true, but even he has no right to remove the tombstones, the property of which remains in the persons who erected them.

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The rest of the Court concurring, the rule was

Refused.

(IN THE EXCHEQUER CHAMBER.)

WILLIAMS and Others v. BARTON and Another. *June 10.*

ERROR from K. B. The Plaintiffs below had sued *A.* and *B.* in *trover* to recover from the Defendants below the value of certain *East India* warrants for the delivery of which, having, by their brokers, purchased cottons, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of *A.* Immediately after the purchase, *B.* paid *A.* one-half the value. When considerable purchases had been made, the brokers were informed that *B.* had an interest in the goods purchased, and upon directions from *A.* and *B.*, divided the goods held on their joint accounts, by appropriating specific warrants to each party; *A.*, after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers; as a security for which, the whole of the warrants were deposited with *C.* by the brokers.

Before the bills became due, the brokers were directed by *A.* to get one-half renewed. *C.* having discounted fresh bills for this purpose, the brokers who had obtained the warrants from *C.* for the purpose of dividing them and returning him one half, left in the hands of *C.*, as a security, the warrants belonging to *B.*, *C.* not knowing that *B.* had any interest in them:

Held, that *B.* might recover from *C.* in respect of the goods thus pledged to him by *A.*

a quan-

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a quantity of cotton, and certain quantities of cotton stated in the declaration. At the trial before *Abbott C.J.* at the *London* sittings a verdict was found for the Plaintiffs below, damages 7337*l.*, subject to the opinion of the Court on the following case:

In the year 1818, *John Moon*, who then carried on business at *Manchester* as a cotton merchant, under the firm of *J. Moon and Son*, having agreed with the Plaintiffs below (who also carry on business at *Manchester*) to make a purchase on joint account with them of cottons, gave directions to his brokers, *Hunt and Sharp*, of *London*, to purchase, at the *East India Company's* sales, cotton to a considerable amount, on the account of *J. Moon*. *Hunt and Sharp* accordingly purchased, at several sales between the months of *January* and *June*, in that year, cotton to the amount of 20,000*l.*, and obtained orders for the delivery of it, commonly called *East India* warrants, which were made out in the name of *Hunt*, as the broker employed at the sale, and were left in the possession of *Hunt and Sharp*, as the brokers of the said *John Moon*. The Plaintiffs below, immediately after the purchases, paid *Moon and Co.* one-half of the value of the cottons. *Hunt and Sharp* knew that *Moon and Co.* were occasionally in the habit of making purchases on joint account, but at the time of making the first purchases in question, had no knowledge that the Plaintiffs below were in any way concerned. When half the purchases were completed, they were apprised that the Plaintiffs below had some interest in the purchases in question. It was subsequently agreed between the Plaintiffs below and *J. Moon*, that the cottons should be divided; and accordingly, in *February* 1819, written directions were given by the Plaintiffs below to *Hunt and Sharp* to make divisions of the cottons held by them on the joint account of *Moon* and the


the Plaintiffs below; and they having received similar directions from *Moon* and Co., proceeded to make the division, by specifying, in separate columns, the warrants which were respectively appropriated to the Plaintiffs below and *Moon* and Co.; and on the 20th *February* 1819, they communicated such division to both parties, and received their approbation of the same. At the latter end of *November* 1818, *Moon* directed *Hunt* and *Sharp* to procure him a loan of from 20,000*l.* to 25,000*l.* on the security of the *East India* warrants then in their possession: they informed the Defendants below of the request of *J. Moon*, and applied to them to discount acceptances of them, *Hunt* and *Sharp*, on bills drawn by *Moon* and Co. upon the security of the whole of the warrants: this the Defendants below agreed to do; and, accordingly, eight bills, payable at three months after date, were drawn by *J. Moon* and Son upon, and accepted by *Hunt* and *Sharp*, falling due respectively 27th *February*, 1st *March*, 3d *March*, and 4th and 5th *March*, all of which were duly paid at maturity. These bills were discounted by the Defendants below in the beginning of *December* 1818; and at the time of receiving the money from the Defendants below, and as a security for the payment of the bills, *Hunt* and *Sharp* deposited with the Defendants below the whole of the warrants.


On the 23d *February*, *Hunt* and *Sharp* received from *Moon* and Co. the following directions, contained in a letter, dated 15th *February* 1819: "Half the amount from *Williams's* is all I would wish, or even nothing, if you can force off every bale of cotton I have in *London*. Cash in time. If half should be done by *Williams* and Co. *Mr. B.'s* warrants might remain." An application was, in consequence, made by *Hunt* and *Sharp* to the Defendants below to renew 10,000*l.* of the amount of the original bills, which the Defendants below agreed to do, by

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discounting

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discounting other bills, similar to the former, on a sufficient number of the warrants to cover them to that amount being left as a security for such renewal. *Hunt* and *Sharp* did not at any time previous to such renewal communicate to the Defendants below that any alteration had taken place in the property, or that the Plaintiffs below had any concern in it. On the 2d *March*, *Sharp*, of the firm of *Hunt* and *Sharp*, received the warrants from the Defendants below, for the express purpose of dividing them, so as to take 10,000*l.* worth of them away, and to return 10,000*l.* worth to the Defendants below, to remain as a security for the renewed bills: he took them to his counting-house for the purpose of making such separation; and having made it, returned to the Defendants below the warrants belonging to the Plaintiffs below, retaining those which had been appropriated to *Moon* and Son: in so doing he acted by the direction of *Moon* and Son, but without any communication with or authority from the Plaintiffs below. The Defendants below discounted two bills of 2490*l.* 8*s.* and 2569*l.* 12*s.* respectively, drawn as before, by *Moon* and Son, upon, and accepted by *Hunt* and *Sharp*, on the 2d *March*; and two other bills of 2496*l.* 15*s.* and 2564*l.* 15*s.* on the 11th *March*; which four bills amounted to 10,121*l.*, and which were dishonored when they became due. The Defendants below sold the cottons in question for 7337*l.*

The question for the opinion of the Court below was, whether the Plaintiffs below were, under the circumstances, entitled to maintain the action of trover. Upon this question they gave judgment for the Plaintiffs below (a) in *Hilary* term 1822, when the special case having been turned into a special verdict, a writ of error was brought into this Court.

(a) 5 B & A. 395.

Tindal, for the Plaintiffs in error. First, the Plaintiffs in error had a lien upon the whole of the warrants, or, at all events, upon an undivided moiety of them to the extent of the bills last accepted; secondly, they were tenants in common with the Defendants in error of the whole of the warrants, and therefore were not liable to be sued in trover. The question is a question of strict law, neither of the present parties being to blame.

The Defendants in error were either sub-contractors with *Moon* or partners with him in this transaction; and, in either case, the pledge made by *Moon* is binding on them. If they were sub-contractors, the property of the cottons was in *Moon*, and he had a right to dispose of them, as in *Savile v. Robertson* (a), where, although goods were purchased for a specific purpose, yet the supercargo, who alone appeared in the transaction, was considered solely interested. And in *Young v. Hunter* (b), where one person purchased goods, and another was afterwards permitted to share in the adventure, it was holden the vendor could not recover the price of the goods against the person so subsequently taking a share. *Gibbs J.* said, "If parties agree amongst themselves that one house shall purchase goods, and let another into an interest in them, that other being unknown to the vendor, in such a case the vendor could not recover against him, although such other person would have the benefit of the goods." If, however, the Defendants in error had a joint interest with *Moon*, his authority to pledge the whole was indisputable, and no distinction can be made in this respect between general partners, and partners for an individual transaction. *Raba v. Ryland* (c), *Ex parte Gellar*. (d)

But, secondly, after the pledge by *Moon*, the Plaintiffs

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(a) 4 T. R. 720.
 (b) 4 Taunt. 582.

(c) *Goav's N. P. C.* 132.
 (d) 1 Rose, 297.

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in error became tenants in common of the warrants with the Defendants in error, at all events as to a moiety, and therefore were not liable to be sued in trover by their co-tenants, unless there had been a destruction of the property. *Co. Lit.* 200., *Heath v. Hubbard.* (a)

The division of the warrants made by *Sharp* occasions no alteration in the case, for in effecting that division he acted as the agent of the Plaintiffs in error, who having a lien on the whole of the warrants, might, if they pleased, have made the division in their own counting-house.

Pollock for the Defendants in error.

The original purchase was made on the joint account of the Defendants in error and *Moon*. The Defendants in error, therefore, were not sub-contractors with *Moon*, and the cases of *Young v. Hunter* and *Savile v. Robertson* do not apply. Then, after the division of the warrants by *Sharp*, there was no longer any community of interest between the Defendants in error and *Moon*, but the Defendants in error were separately entitled to their moiety, which *Moon* had no authority to pledge, and in which, therefore, under his pledge, the Plaintiffs in error could not acquire any property. The Defendants in error might, therefore, maintain trover against the Plaintiffs in error; for even supposing the division by *Sharp* did not effect a separation of the property of the Defendants in error from the property of *Moon*, still the pawnee of a pledge does not become tenant in common with others who have an interest in the pledge as well as the pawner. A tenant in common would have the rights of an absolute owner, whereas a pawnee has only a lien on the property and cannot sell. It is laid down in *Comyn's Digest* (*tit. Action on the Case*

(a) 4 *East*, 110.

upon *Trover, E.*) that if a bailee sells the goods of another, the very act of sale is such a conversion as to enable the owner to maintain trover.

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BEST C. J. The counsel for the Plaintiff in error has reminded us that we are called on to decide a question of strict law. I feel that this is our situation, and on this account *only*, I give the judgment that I *shall* give in this case.

Had I authority to alter the law, as the mode of carrying on commerce has altered, I would say that, when the owner of property conceals himself, whoever can prove a good title under the person whom the concealed owner permits to hold it, should retain that property against the owner:—but this is not yet the law of *England*. Possession is not proof of property. Our ancestors kept their goods in their own possession. If agents were employed by them to deal with their property, they did not keep themselves out of view, and the extent of the authority of the agent was so well known, that no one dealing with these agents could be imposed upon. But as little credit was given, and as men could not trade beyond their capital, they were seldom reduced to the necessity of pledging their stock in trade. The sales of merchandize were made in market overt, and if the buyers conducted themselves honestly, the law protected them from suffering by purchasing in market overt property that did not belong to the person of whom they bought. This exception in our law proves that if a person acquires the possession of property in any mode, other than that of sale in market overt, he cannot keep it against the owner; it proves at the same time, that, as commerce is now carried on, the purchaser or pawnee should have the same protection against him who permits another to deal with his property, as if it were his own. But a small proportion of the merchan-

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dize that is now brought to sale, is sold in market overt. The law relative to sales in market overt, affords, therefore, but little protection to those who are engaged in commerce.

The owners of goods for many reasons keep themselves concealed, and put forward brokers to act for unknown principals. If such brokers abuse their trust, those who have trusted them should suffer: but it is for the legislature, and not the courts of justice, to adapt the law to this new state of things. As the law now stands, if the pawner of goods has no authority to make the pledge, the pawnee cannot hold them against the owner. What then is the present case? The goods had been originally purchased by *Hunt* and *Sharp* on the joint account of *Moon* and *Bartons*; whilst *Moon* and the *Bartons* were tenants in common of those goods, they were pledged by *Hunt* and *Sharp* to the Plaintiffs in error for 20,000*l.* for *Moon* only, unknown to the *Bartons*. If the *Bartons* had brought their action to recover their share of the goods, whilst they remained under this first pledge, they might probably have been told they were only tenants in common, and could not support the action against persons who held under their co-tenants. It would also have been necessary to consider the effect of the cases to which we have been referred, and which seem to shew that one part owner of a joint adventure may bind the property of the others concerned. But 10,000*l.* of the original debt was paid off, and it was agreed between *Hunt* and the Defendants below that they should renew those acceptances for the 10,000*l.* remaining unpaid; that they should give back the whole of the warrants to *Hunt*, and allow him to select from them such as he thought proper to pledge for the 10,000*l.* The Defendants below parted with their lien on the whole of the warrants, and gave *Hunt* leave to say which he would select to repledge for this reduced debt. Before this

happened the goods had been divided, and one moiety was the sole property of the *Bartons*, and the other moiety the sole property of *Moon*. When *Hunt* got back these warrants, he held those that related to the *Bartons'* share for them, and those which related to *Moon's* share for him. Neither *Moon* nor *Hunt* could then pledge the *Bartons'* warrants without their assent. *Hunt* was then bound to use the right of selection, which the Defendants below had given him, as honesty required; that is, by carrying back *Moon's* warrants to the Defendants below, and keeping the *Bartons'* for them. The Defendants below having parted with the lien on the whole, could only require such part to be brought back as *Moon* had a right to pledge. Instead of which, under the authority of *Moon*, and of *Moon* only, *Hunt* pledged those warrants with which *Moon* had now no more to do, than one who never had any interest in them.

It has been contended at the bar that none of the warrants were out of the possession of the Defendants below, for the possession of *Hunt* was the possession of the Defendants below, and that he was to sort the warrants for them. We cannot consider *Hunt* as the agent of the Defendants below, but of *Moon*; and, therefore, when they were in *Hunt's* hands, they were, in law as well as in fact, out of the possession of the Defendants below. *Moon* had certainly contracted to repledge, not the whole, but enough to serve the new loan of 10,000*l.*, and he is answerable to the Defendants below in damages for the non-performance of that contract; but after the Defendants below had given the possession of the warrants to *Hunt*, with authority to *Hunt* to return such as he pleased, they had no legal means of getting any of these warrants in specie. They were then in *Hunt's* hands as agent of the *Bartons*, and he could not part with them again without their assent. We con-

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sider that the first pledge was given up entirely, and a new contract made by the second transaction. We are all, therefore, of opinion that the Judgment of the *King's Bench* must be affirmed.

Judgment affirmed.

June 15.

RATCLIFFE v. BLEASBY.

The Defendant, after settling a draft of articles of partnership with the Plaintiff, having engrossed and executed a deed, differing in some respects from the draft of the articles, the Plaintiff refused to execute the deed; but having afterwards commenced an action for breach of agreement to take him into partnership, he moved to be at liberty to inspect and copy the deed. The Court refused to order such inspection.

AN affidavit of the Plaintiff's attorney stated, that this action was brought to recover a compensation in damages, for breach of an agreement to take the Plaintiff into partnership; that a draft of the articles of co-partnership was prepared by the Defendant's attorneys, perused and settled by the Plaintiff, and returned by him to the Defendant's attorneys; that an engrossment of a deed of co-partnership between the Plaintiff and Defendant was made, signed, and executed by the Defendant, and retained in his possession; that the Plaintiff had no copy of the draft or deed, and that the Defendant had refused to furnish copies at the Plaintiff's expence.

Cross Serjt., upon this affidavit, and upon an opinion pronounced by him at the requisition of the Court, that a copy of these instruments was necessary to enable the Plaintiff to declare safely, obtained in the last term a rule *nisi* for the Plaintiff to be at liberty to inspect and take a copy of the above-mentioned draft and deed.

Wilde Serjt. (upon an affidavit which stated that the deed executed by the Defendant differed in some respects from the draft settled by the Plaintiff, and that the Plaintiff had, therefore, refused to execute the deed)

now

now shewed cause against the rule. He urged, that in all the decisions the principle on which the indulgence now asked by the Plaintiff had been granted, was, that the party holding the instrument was a trustee for the party requiring a copy; that this could not be the case with a party holding instruments, neither of which had been signed by the Plaintiff; and upon which, therefore, he could have no cause of action.

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Cross. The draft assented to by both parties is their agreement, though not signed. *Morrow v. Saunders* (a) is a decision expressly in favor of the present application, the only difference between the two cases being, that in that case the Plaintiff retained a deed which had been signed and was called for by the Defendant; in the present the defendant has signed and retained a deed called for by the Plaintiff. In *Clifford v. Taylor* (b), *Blakey v. Porter* (c), *Bateman v. Phillips* (d), and *King v. King* (e), the court has recognised the convenience of this practice, and its own jurisdiction to pursue it. That jurisdiction enables them to compel parties to a suit to do justice. How far the engrossed instrument may be binding on the Defendant is a matter to be ascertained at the trial of the cause, and not summarily upon motion; but if he be refused a sight of it, he may be nonsuited, and prevented from entering into the merits of his case.

BEST C. J. I agree with the observations which were made from time to time by *Mansfield* C. J., that it is fit for the courts of law, as far as possible, to save its suitors from the expence of resorting to a court of equity, in order to establish a common law right. If, however, the law compels them to proceed in that course,

(a) 1 B. & B. 318.
 (b) 1 Taunt. 167.
 (c) *Id.* 386.

(d) 4 Taunt. 157.
 (e) 4 Taunt. 666.

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we have not authority to alter it; and the only question for us to decide at present, is, whether we are warranted, by any rule of practice established in this court, to do what is now required of us. But as to the deed, we should go farther than the Court has ever yet gone, if we acceded to the present application; for though the deed has been signed by the Defendant, the Plaintiff has refused to sign it, and thereby has repudiated all interest in the instrument: having done this, he cannot call on the Court to order an inspection; for the principle established by all the cases is, that a party can only be compelled to produce a deed where he holds it as a trustee for another. In *Bateman v. Phillips*, indeed, the party applying was not a party to the instrument, but it was given to the party who held it, to allay the apprehensions, and afford a kind of security to the creditors of a bank on which there had been a run. By that instrument the holder, *Bowling*, was authorised to assure the inhabitants of *Peimbroke* that the subscribers to it would be accountable for the payment of notes issued by the *Milford* bank to the extent of 30,000*l.* The authority in writing, therefore, given to *Bowling*, was for the advantage of the Plaintiff who was a creditor, as well as the other creditors; and *Mansfield C. J.* says, "This rule is called for on the ground that the Plaintiffs are interested in the paper, and that is the only ground on which they can support their application. On the declaration the Plaintiffs state, that, at the time of giving the guarantee, they held some notes, and in consequence of it became possessed of others." He, therefore, puts it upon the ground that the party who held it held it as trustee for the others: he then goes on, "This paper is certainly not of a public nature, like corporation books or records, but it is a paper in which the Plaintiffs are interested. In the case of *Osborne v. Taylor*, in the Court of King's Bench, it seems admitted,

ted, that if the party had been interested he might have had the production of the instrument."

So in the present case, if the Plaintiff had any interest the Defendant would not be permitted to withhold the deed. *Morrow v. Saunders* is clearly distinguishable from the present case, because the deed was required by the party who *had* executed it at the hands of the party who had *not*. It is just the converse of this case, in which, if the Plaintiff had executed the deed instead of the Defendant, there might have been some ground for the application. In *Blakey v. Porter, Mansfield C. J.* puts his decision on the same footing as in *Bateman v. Phillips*. "Of what use would the Defendant's covenant be, if the Plaintiff could not get access to it? Parties, in order to save the expence of double stamps, are unwisely content to execute one part only of an indenture. Is it not, however, the necessary consequence of this practice that the party who has the custody undertakes to produce the deed when wanted for the use of both?"

He puts it on the principle of an implied undertaking that the party who has the deed holds it as a trustee for both. That case, however, has nothing in common with the present, but the opinion of *Gibbs C. J.*, in *Street v. Brown* (a) is conclusive: there, two parts of a charter-party were supposed to have been interchangeably executed, and the part of which the master of the chartered vessel had the custody, was lost at sea with the ship, but the court would not compel the charterer to grant an inspection and copy of the other part, for the purpose of the Plaintiffs declaring with certainty; and the ground on which the Chief Justice decides is, "The one party executes a deed, by which he binds himself, and the other executes a deed by which he binds him-

(a) 6 Taunt. 302.

self,

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self, and the one having lost his part, calls on the other to produce his: it is like the case where a man having given a bond and kept a copy of it, the other losing the bond applies for a copy of the copy: — we should not grant that.”

In the course of his judgment he has commented on all the cases, and has declared the principle on which inspection is ordered, to be, that the party holding the instrument is considered a trustee for the party applying. How can that be affirmed in the present case? It has been urged, indeed, that, by the production of the deed at the trial, the Plaintiff may be nonsuited; but if we were to act on that consideration, we might on motion order something like a bill of discovery in every case. In ejectment, the lessor of the Plaintiff is always liable to be nonsuited by the production of deeds which may disclose a title better than his own; but in order to obtain a sight of them, he must apply to a court of equity. In the present case, however, one of the instruments, the draft of the articles of co-partnership, appears to have been at one time agreed on by both parties; as to that, the Defendant stands in the situation of a trustee for the Plaintiff, and the rule for its production must be made absolute.

PARK J. The principle on which these applications have been granted is, that the party holding the deed has been a trustee for the party requiring a sight of it; but the Defendant in this case cannot be esteemed a trustee for the Plaintiff, as to a deed which the Plaintiff refused to execute. The principle laid down by the Court of King's Bench in *Taylor v. Osborne* is, that the application will not be attended to where the party applying is neither an instrumental party, nor has any interest in the deed; and that seems the more expedient rule; *Street v. Brown* seems to trench closely upon

Taylor v. Osborne, and to be a case of some hardship; but our jurisdiction ought to be exercised consistently with the rule of law, and not to infringe upon the province of equity. *Morrow v. Saunders* is quite consistent with what we now decide, for in that case the deed was executed by the party who applied for its production. The draft of the articles in the present case is, however, an instrument in which both parties have an interest, and as to that the rule must be made absolute.

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BURROUGH J. Upon the affidavits now before us, the deed required can be of no avail to the Plaintiff, and inspection has only been allowed of what the party would probably give some evidence. This deed has been repudiated by the Plaintiff, and amounts to nothing. Where both parties have an interest in the same deed, I hope we should come to the good sense of the thing, and order an inspection, without driving them into a court of equity; but even equity would not compel the production of a title deed, in which both parties litigant have not an interest.

GASELEE J. I cannot accede to the position that this Court has jurisdiction in all cases to compel parties to do what is requisite for the purposes of justice. But when a party has an interest in a deed he has a right to inspect it, as the creditors, in the case of *Bateman v. Phillips*; the Plaintiff however has no interest in this deed of which he requires the inspection. In the draft of the articles he may have an interest, because that was settled by both parties, as the foundation of a mutual agreement. But the Plaintiff having refused to execute the deed, it can neither be necessary to enable him to declare, nor can he have any right to call for its production. The rule, therefore, must be made

Absolute as to the draft of the articles only, and discharged as to the deed.

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June 17.

DAVIES and Others v. ARNOTT, HASKINS, and SHEPPARD.

Obligors in a bastardy bond discharged under the insolvent debtor's act subsequently to a judgment on the bond, are liable for expences incurred in respect of the bastard subsequently to their discharge.

SCIRE facias on a judgment in an action on a bastardy bond, the condition of which was to indemnify the parish of *Christ Church* against all charges and expences which might be imposed on them for the birth, maintenance, clothing, educating, or bringing up a bastard child, of which *Arnott* was the reputed father. The *scire facias* suggested that since the time of the Plaintiffs' recovery upon breaches of the condition of this bond formerly assigned, the Defendants had again broken the condition, by allowing the parish to incur farther expence in respect of *Arnott's* child.

The Defendant *Haskins* pleaded, that since the recovery of the said judgment, and after the occurring of the subsequent breach of condition, and before suing out the *scire facias*, by an order of the court for the relief of insolvent debtors, *Haskins* was discharged from the said further breach, and the damages thereby sustained by the parish since the said judgment.

Defendant *Sheppard* pleaded that he was in custody in the *Fleet* in *July* 1824; that the causes of action, if any, accrued against him before he was so in custody; that afterwards, by an order of the court of insolvent debtors, he was duly discharged according to the act of parliament, and thereby discharged from the said causes of action, if any.

The Plaintiffs replied, as to *Haskins*, that the further breach suggested in the *scire facias* was committed after the making of the order of the insolvent debtor's court, and that by such order *Haskins* was not discharged from the

the said further breach, and the damages thereby sustained by the parish.

And as to *Sheppard*, that the further breach was committed, and the damages thereby occasioned were sustained by the parish, after the making of the order of the insolvent debtor's court, and that by such order *Sheppard* was not discharged from the said further breach, and the damages thereby sustained by the parish.

These replications concluded to the country, and the Defendants having joined issue, the cause was tried before *Best C. J.* at the *London* sittings after *Easter* term last, when it was proved that the parish had paid sums on account of *Arnot's* child, from *April* 1824, to *March* 1825, but that *Haskins* and *Sheppard* having included in their respective schedules the bond and judgment on which the present *scire facias* was brought, were discharged by the court for the relief of insolvent debtors, in *October* 1824, and a verdict was taken for the Plaintiffs for such damages only as had accrued since that period, with leave for *Haskins* and *Sheppard* to move to set aside the verdict, and enter it in favor of themselves.

Onslow Serjt., for the Defendant *Sheppard*, and *Wilde* Serjt., for the Defendant *Haskins*, having obtained rules *nisi* accordingly, on the ground that by the discharge under the insolvent debtor's act, they were released from all further claims in respect of the bond,

Taddy and *Pell* Serjts. shewed cause.

By 1 G. 4. c. 119. s. 10. the bond creditors of an insolvent are to be entitled to receive a dividend of the estate of the prisoner in such manner and upon such terms and conditions as if the prisoner had become bankrupt. Now in bankruptcy the just and true debt alone can be proved, and not the penalty of a bond,

21 *Jac.*

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21 *Jac.* 1. c. 16. s. 9.; and the bankrupt is only discharged from such debts as are capable of proof under the commission. But the future expences which may be incurred by a parish in maintaining a bastard are altogether contingent, cannot be the subject of valuation or proof; nor can the bankrupt be discharged from them by his certificate. *Overseers of St. Martin's v. Warren.* (a) A bond given by the putative father and his sureties, or even a promissory-note, *Cole v. Gower* (a), are no more than a security or indemnity against future debt, and every expence incurred after certificate is a new debt, and a new cause of action. Previously to the 49 G. 3. an annuity could not be proved unless it were secured by a bond with a penalty; and, even in that case, the penalty was not the subject of proof, but only the value of the annuity, provided it did not exceed the penalty. But a mere engagement for indemnity, where no damnification had been incurred, could never be proved. *Millen v. Whittenbury* (c), *Goddard v. Vanderheyden* (d). And even if the contingency on a bastardy bond could be valued like the future payments of an annuity, it is contrary to the policy of the law to allow any proof or anticipative payment in respect of it, lest the parish-officers, having received such payment in advance, should thereby have an interest to neglect the child. *Cole v. Gower*. The judgment which has been obtained in this case is only for damages up to the time of the action, and under the 8 & 9 W. 3. c. 11. does not constitute a debt, but, like the bond itself, stands only as a security against future expences. Then by the 28th section of 1 G. 4. c. 119. the insolvent's discharge is not to apply to any judgment which cannot be put in force at the time of the discharge; and

(a) 1 B. & A. 491.

(b) 6 East, 111.

(c) 1 Camp. 428.

(d) 3 Wils. 270.

in respect of half of the expences claimed under the present *scire facias*, the judgment on the bond could not have been put in force at the time of the insolvent's discharge.

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Onslow and *Wilde* in support of the rule.

The causes of action upon this *scire facias* did not arise subsequently to the judgment; for the judgment is the cause of action, *Executors of Wright v. Nutt* (a), and the *scire facias* is no more than a continuation of the suit. With regard to proof of debts under a bankruptcy, although contingent damages are not provable in respect of a covenant, yet a penalty may be the subject of proof, *Ex parte Mare* (b), and before the 49 G. 3. an annuity could only be proved in virtue of the penalty of the bond under which it was secured. In all the cases the forfeiture of the bond is the ground of proof. *Toussaint v. Martinnant*. (c) The future expences attending the maintenance of the child are not more a matter of contingency than the future payments of an annuity, and are equally susceptible of valuation. There are many contingent claims, which may be the subject of proof under a bankruptcy, as in *Ex parte Rowlatt* (d), where the engagement was to pay 200*l.* a year till the party obtained church preferment; and the proof may go to the whole, although the forfeiture has only been in respect of a part of the contingency. *Ex parte Winchester* (e), *Ex parte Cockshott*. (f) [Best C. J. In all those cases there was a debt, a saleable debt; can a mere bond of indemnity, in a case like this, be sold?] A bail bond is not a security for a debt, but for the Defendant's appearance, and yet if it be forfeited before

(a) 1 T. R. 388.

(b) 3 Ves. 335.

(c) 2 T. R. 100.

(d) 2 Rose, 416.

(e) 1 Atk. 117.

(f) *Cooke's Bkpt. Laws*, 163.

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bankruptcy, it is discharged by the certificate. *Coulson v. Hammon.* (a) So where the forfeiture is before bankruptcy, proof may be admitted in respect of a payment to be made afterwards. *Hodson v. Bell* (b), *Ex parte King.* (c) In the case of the overseers of *St. Martin's v. Warren* no judgment had been obtained upon the bond, so that the cause of action was clearly new; and in *Cole v. Gower* the overseers had stipulated to receive a particular sum instead of an indemnity, which stipulation the Court held to be illegal; but it was, notwithstanding, holden allowable for them to receive such a sum on a motion to stay proceedings on a bastardy bond, on payment of the penalty. *Shutt v. Proctor.* (d) As to the statute of 8 & 9 W.3. c.11., that does not prevent the judgment from being, like every other judgment, a fixed and proveable debt, but only regulates the time and mode of execution. In the 26th clause of the 1 G. 4. c.119. the causes for which the insolvent may be imprisoned anew, are enumerated; a claim like that on the present bond is not among them, and in a decision on a similar act, was holden not to be sustainable. *Cotterel v. Hook.* (e)

BEST C. J. Even if we could have been satisfied that the Defendants would have been discharged by bankruptcy and certificate, that would have fallen far short of proving that they were discharged under the provisions of the insolvent debtor's act; for in the present case we must look to that act only, and if that does not exonerate the Defendants from every claim in respect of their bond, the bankrupt laws cannot avail them. But it is not clear that they could have been discharged,

(a) 2 B. & C. 626.

(b) 7 T. R. 97.

(c) 3 Ves. 334.

(d) 2 Marsh. 226.

(e) 1 Doug. 97.

even by bankruptcy and certificate. According to the principle established, in *Cole v. Gower*, the claim for future contingent expences in respect of such a bond, could not be provable under the commission, and if it be not provable, the bankrupt cannot be discharged from it by certificate. Lord *Ellenborough* says, public policy requires that the parish officers should not be allowed to take a specific sum in respect of such a claim, because they would thereby have an interest to neglect the child for whom it was paid. They have, therefore, no certain or saleable property in such a claim. But in all the cases in which an interest, though contingent, has been allowed to be proved under a commission of bankruptcy, that interest has been a saleable interest, which distinguishes it at once from the present claim. The case, therefore, of the overseers of *St. Martin's v. Warren* is in point for the Defendant. In that case, the obligee, in a bastardy bond, after the bond had been forfeited, became bankrupt and obtained his certificate; and it was holden that the parish officers were not thereby precluded from recovering on the bond further expences incurred subsequently to the bankruptcy: the Court said, "This was a debt upon a contingency, and one too in its nature wholly incapable of valuation, and, therefore, not provable under the commission. The case of an annuity is an exception to the general rule: there, indeed, the Courts have admitted the amount of the contingent debt to be valued and proved: but there you can only estimate the duration of life; here, the expences for which the party is liable may vary in consequence of the sickness of the child; the contingency here is, not only the duration of life, but the continuance of health; it is subjected to every accident of human life, and is most precarious and uncertain; how then could its value be estimated so as to be proved under a commission?"

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If, therefore, the present had been a case of bankruptcy, that decision would not have been distinguishable. But independently of any principle of the bankrupt laws, the words of the insolvent debtor's act of themselves decide the case. This is a bond for the payment of uncertain damages; for the liquidation of a future account; and as such, is within the statute of 8 & 9 W. 3. c. 11. s. 8. Now what is the situation of the obligor under that statute, after judgment has been entered up on his bond for damages incurred by antecedent breaches of condition? Is there any debt created in respect of future contingent damages? No, but merely a security in case they accrue. The judgment has an effect with respect to such damages, but its only effect is that of being a lien on the obligor's real property from the time of signature. "In case the Defendant after judgment and before execution shall pay into court the damages assessed and costs, a stay of execution shall be entered, or if by reason of an execution, the Plaintiff should be fully paid, the Defendant's body, lands, or goods shall be thereupon forthwith discharged, but the judgment shall, notwithstanding, remain as a further security to answer the Plaintiff for such damages as he may sustain by any further breach contained in the same deed, upon which Plaintiff may have a *scire facias* upon the said judgment against the Defendant, suggesting other breaches." The Plaintiff cannot sue for the penalty, even in the first instance, but only for the damages he has actually sustained, and when they have been satisfied, he can issue no execution till he suggests that fresh damages have subsequently occurred. How does the insolvent act 1 G. 4. c. 119. apply to this? by the 28th section it is "provided, that it shall be lawful to proceed against the prisoner discharged, upon any judgment, recognizance, or other security obtained or given, which could not have been put in force against such prisoner at the time of his obtaining such discharge,
 any

any thing in that act contained to the contrary notwithstanding." It is clear that at the time of the insolvents' discharge, the judgment could not have been put in force, for the expences which have subsequently accrued. Therefore, coupling this proviso with the 8th section of the 8 & 9 *W. 3. c. 11.* the Defendants are clearly liable on this *scire facias*,

The 26th section has no application to the present case, and the decision in *Douglas* to which we have been referred proceeded on a statute which did not contain any provision similar to that in the 28th section of 1 *G. 4. c. 119.*

That section overrides the whole act, and the prisoner can claim no exemption from a judgment, unless it is one that could have been put in force at the time of his discharge. My opinion proceeds on this provision of the statute; and without any reference to the bankrupt laws, the rule which has been obtained in behalf of the Defendants must be discharged.

PARK J. The only question is, whether coupling the statute 8 & 9 *W. 3.* with the insolvent debtor's act, the Defendants are discharged. This case clearly falls within the statute of *W. 3.*, and the provision in the 28th section of the insolvent debtor's act is conclusive. Could the judgment on which this *scire facias* proceeds have been put in force at the time of the prisoner's discharge? unquestionably not. The principle established in *Cole v. Gower* was recognised in *Staniforth v. Slagg* before *Lawrence J.* at *Nisi Prius* on the northern circuit, and his decision was afterwards confirmed upon a motion in the Court of King's Bench. *Shutt v. Proctor* did not overrule *Cole v. Gower*, and is clearly distinguishable.

BURROUGH and GASELEE Js. concurring, the rule was
Discharged.

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June 17.

COMBE and Others v. CUTTILL.

In C. B., provided there be fifteen days between the teste of the first and the return of the second, a second writ of *scire facias* may be tested and issued before the *quarto die post* of the return of the first.

Sunday may be reckoned as a day in one of the four days which must elapse between the return of the second writ and signing judgment.

WILDE Serjt. moved to set aside two writs of *scire facias* which had been issued against *Moate*, one of the bail in this cause, together with a *feri facias* which succeeded them, upon the ground, among other objections, that though *Moate* was constantly resident, and might have been found within the bailiwick of the sheriff of *Middlesex*, from the time the first *scire facias* was sued out to the time when the second was returned, and could have rendered his principal, if called on to do so, he had received no notice whatever of the writs, to each of which the sheriff of *Middlesex* had returned *nil* and *non est inventus*.

And also, that the second writ was tested on the same day as the return of the first.

The first was tested on the 6th of *November*, made returnable in eight days of *St. Martin* (the 18th), and issued on the 17th, with a direction to be returned *non est inventus*.

The second was tested on the 18th, issued on the 19th, and made returnable in fifteen days of *St. Martin* (the 25th *November*) with a direction to be returned *non est inventus*. He also objected, that the judgment which was signed on the 30th of *November* was premature, one of the days between the 25th and the 30th having been a *Sunday*; so that there were not four clear juridical days before the return of the writ and the signing judgment. Where bail were concerned the four day rule ought to exclude a *Sunday*, as the bail could not render on that day; *Wathen v. Beaumont*. (a)

(a) 11 East, 71.

The Court having referred to the prothonotary to state what was the practice as to the *scire facias*,

He reported, that the practice had in some instances been, to give the order for and teste the second writ of *scire facias* on the return day of the first, or before the *quarto die post*, and in some instances on the *quarto die post*: and that he thought either course was right. The practice as to the signing judgment was usual and regular.

Wilde now objected to this report, that in all the books of practice it was laid down that the second writ must be tested on the *quarto die post* of the return of the first; and that the first was generally returnable on a *Sunday*, on which day the second writ could not be tested or issued.

BEST C. J. There are many parts of the practice of the court for which it might be difficult now to assign a reason; but that practice having been established and acted on, it is better to abide by it. Our officer has reported, that the course which has been pursued in the present instance is not irregular, and the only thing of importance is, that the bail should have fifteen days to render, which they have had here, between the teste of the first writ and the return of the second. With respect to the signing of the judgment, the course in this court has always been to consider *Sunday* as one of the four days which are allowed before signing; and *Creswell v. Green* (a) is directly contrary to the case in 11 *East*.

PARK and BURROUGH Js. concurred.

(a) 11 *East*, 537.

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GASELEE J. I feel myself bound by the report of the officer; but it seems so contrary to common sense, that the party should have four days to appear after the return of the first writ, and yet that a second may issue before the four days have elapsed, that I hope the subject will be taken into consideration.

As to the signing the judgment, I think the practice is clearly ascertained in this court, and reasonable.

Rule discharged.

June 20.

TAPLIN v. ATTY.

Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it: Held, that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents.

TROVER against the sheriff of *Warwickshire*, for certain goods of the Plaintiff which the sheriff had taken under an execution, issued by one *Reynolds* against the effects of one *Stanton*.

At the trial before *Park J.*, *London* sittings in *Easter* term last, in order to connect the sheriff with the transaction, the bailiff who conducted the execution was called, but without any *subpœnâ duces tecum*, to produce the sheriff's warrant for levying; he, however, stating that he had returned the warrant to the under-sheriff, the Plaintiff, in order to entitle himself to give parol evidence of its contents, proved service on the Defendant's attorney of a notice to produce the warrant at the trial, the Defendant having been still in office at the time the warrant was returned to the under-sheriff. The learned Judge, however, thought this was not sufficient, and that the Plaintiff ought to have given such a notice to the under-sheriff or his attorney, which not having been done, the Plaintiff was nonsuited.

Vaughan

Vaughan Serjt. obtained a rule *nisi* in the last term to set aside this nonsuit and have a new trial, on the ground that, under the circumstances of the case parol evidence of the contents of the warrant ought not to have been excluded. Against this rule,

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Pell Serjt. in this term shewed cause. The bailiff ought to have been served with a *subpœnâ duces tecum*, and also the under-sheriff, before parol evidence could be received of the contents of the warrant. The constant practice is, that if a warrant be executed, the bailiff keeps it for his own justification, and merely returns to the sheriff a memorandum of what has been done. In *Martin v. Bell* (a) a notice had been given to the sheriff to produce the warrant, but that was holden not sufficient to let in parol proof of its contents.

Vaughan and *Wilde* Serjts., in support of the rule. The warrant was in the possession of the under-sheriff, and his possession is the possession of the sheriff. The sheriff and his officers are one; *Bro. Abr. Sheriff*. In *Drake v. Sykes* (b). *Lawrence J.* said, the admissions of the under-sheriff would affect the sheriff; and a notice to a customer to produce a check is sufficient to let in parol evidence of its contents, although it is lodged at his banker's office, *Coates v. Partridge*. (c) So a notice to a ship-owner to produce papers, although the captain has possession of them for his own protection. (d)

Cur. adv. vult.

BEST C. J. This was an action of trover against the sheriffs of *Warwickshire*, for taking, under an execution

(a) 1 *Stark.* 415.

(b) 7 *T. R.* 117.

(c) 1 *Moody & Ryan*, 156.

(d) *Baldney v. Ritchie*, 1 *Stark.*

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against one *Stanton*, goods which the Plaintiff alleged to be his property. In order to connect the sheriff with the transaction it was necessary to prove his warrant to the bailiff who levied the execution. The bailiff was subpoenaed, but not under a *subpœnâ duces tecum*; had he been called under a *subpœnâ duces tecum* he would probably have procured the warrant, but his account was, that he had returned it to the under-sheriff. There has been some difficulty as to the time at which the warrant was so returned, but my Brother *Park* thinks it was during the time when the sheriff remained in office; no notice was given to the under-sheriff to produce the warrant, and if it had been placed in his hand after the sheriff had gone out of office, our judgment might have been different, for it would be inconvenient, when the sheriff is no longer in office, to compel him to send perhaps across the whole county to apprise his under-sheriff of such a notice: but as he was still in office, and as his under-sheriff is in law identified with him, we think notice to the sheriff is equivalent to notice to the under-sheriff. When, therefore, the notice was served upon the sheriff's attorney, he ought to have sent to the under-sheriff for the warrant. The case of *Martin v. Bell* is distinguishable, inasmuch as the paper was not traced to the hand of the under-sheriff. The rule, therefore, for a new trial, which has been obtained in this case, must be made

Absolute.

1825.

BRAZIER v. BRYANT.

June 20.

ONSLOW Serjt. shewed cause against a rule for an attachment against the Defendant for not performing an award made under a rule of court, and he proposed to prove by affidavit corruption in the arbitrator; but

Corruption in the arbitrator is no answer to a motion for an attachment for non-performance of an award.

The *Court* said, that such an objection was not any answer to a motion for an attachment, although it might have formed the ground of a specific motion for setting aside the award; for this they referred to *Holland v. Brooks* (a) and *Braddick v. Thompson* (b), and observing that the rule in *Holland v. Brooks* was founded on good sense, they made the rule

Absolute.

(a) 6 T. R. 161.

(b) 8 East, 344.

CHATFIELD and Wife, Demandants; SOUTER,
Tenant. June 20.

WILDE Serjt. had obtained a rule calling on the demandants to shew cause why all further proceedings on the above writ of right should not be stayed until the tenant's costs of an ejectment brought for the same premises were satisfied, in which ejectment the lessors of the Plaintiff, after entering the cause for trial in 1816, withdrew the record.

The Court will not stay the proceedings in a writ of right till the costs of a prior ejectment are paid.

Pell

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and
SOUTER.

Pell Serjt., who was to have shewn cause, was stopped by the Court, who called on

Wilde to support his rule. He urged that the practice of the Court was, not to allow the second proceeding to be pursued, till the costs of the first were paid, if the second was substantially the same as the first, and that the rule was not confined to any particular form of action. [*Gaselee* J. referred to the note in 3 *Bosanquet* and *Puller* 23.] That authority limited the rule to cases where the first proceeding had been decided on the merits. But if the demandants had had any merits, they would not have abandoned their ejectment in 1816, and have remained inactive till the present time.

BEST C. J. The abandonment of the ejectment was no decision on the merits, and the Court has no power to stay the proceedings in a writ of right till the costs of a prior ejectment are paid; it is a totally different proceeding: The rule often operates with hardship in ejectment, and it would be more liable to do so in a writ of right, by preventing a party who was poor from asserting his title.

The rest of the Court concurring, the rule was

Discharged.

1825.

DOE dem. MORGAN v. ROE.

June 20.

A RULE in this cause for setting aside with costs a judgment against the casual ejector, and the subsequent execution, on account of some misnomer in the notice of declaration, had been discharged, and execution withdrawn, upon the tenants in possession undertaking to appear, enter into the common consent rule, plead *instanter*, and accept short notice of trial.

No defence was made at the trial, and it not appearing that the tenants had any merits, final judgment was signed and costs taxed, when the lessor of the Plaintiff was served with a rule for the allowance of a writ of error. Whereupon

D'Oyly Serjt. obtained a rule *nisi* for execution to issue against the tenants in possession, notwithstanding the allowance of the writ of error.

His affidavit stated the belief of the lessor of the Plaintiff's attorney, that the writ was brought solely for delay, and that the lessor of the Plaintiff had received notice, that unless the premises were forthwith pulled down, proceedings would be taken on the part of the city of *London* to pull them down, which would put him to a great additional expense; he urged that the undertaking entered into by the tenants in possession amounted to an engagement to try the merits of the cause only, and to avoid delays of every kind.

Pell Serjt., who shewed cause, contended, that without an affidavit of a declaration from the mouth of the tenants in possession, or their attorney, that the error was brought

Where, in ejectment, the tenants in possession,—having undertaken to appear, entered into the common consent rule, plead *instanter*, and take short notice of trial,—made no defence at the trial, but sued out a writ of error when judgment was signed, the Court allowed the lessor of the plaintiff to take his judgment against the casual ejector.

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brought for delay, this rule could not be made absolute, as error would lie on a suit in ejectment, as well as in any other case, and he referred to *Evans v. Swete* (a), *Harrison v. Grote* (b), *Rawlins v. Perry*. (c)

But the Court thought that this proceeding was not a compliance with the undertaking entered into by the tenants in possession, and without deciding any general question, they said the lessor of the Plaintiff might sue out execution on his judgment against the casual ejector.

(a) 2 *Bingb.* 326. (b) 6 *T. R.* 400. (c) 1 *N. R.* 307.

June 10.

PETTY v. ANDERSON.

A wife having carried on business on her own account during the imprisonment of her husband, and he having returned to live with her after his discharge: Held, on motion for a new trial, after a verdict against him, that he was liable for articles furnished in this business, with his knowledge, after his return, though the invoices and receipts were in the name of the wife, and she was rated to and paid the poor's and paving rates.

ASSUMPSIT for goods sold and delivered. At the trial of the cause before *Best C. J. London* sittings, after *Easter* term last, the evidence on the part of the Plaintiff was, that the goods, which were for the purpose of carrying on the confectionery business, had been delivered from the 9th of *August* 1823 to *February* 1824 at a baker's and confectioner's shop, over which was the name *Anderson*. That upon these occasions the Defendant had been repeatedly seen in the shop, and when called on for payment, referred to his wife, saying she managed those things, and adding that he was a journeyman to his wife, that he received no wages, and that the Plaintiff had better not go to law, or perhaps he would get 4s. in the pound. The Defendant's son often ordered the

goods, and when his wife was applied to, she said she would tell Mr. *Anderson*.

The evidence on the part of the Defendant disclosed, that previously to *August* 1823 he had carried on the business of a baker in the house in which the Plaintiff's goods were delivered; had gone to prison, and had been discharged under the insolvent debtor's act, when he returned to live with his wife; that several tradesmen in the neighbourhood had given credit to the wife, who during the Defendant's imprisonment had set up and carried on the business of a confectioner and baker on her own account; the Christian name *Andrew*, which had formerly been inscribed over the shop when the Defendant carried on in it the business of a baker, having been erased, and the name *Anderson* alone being left; the landlord received the rent of the house from the Defendant's wife, and she was rated to and paid the poor's and paving rates; the Plaintiff's invoices and receipts for the goods were also made out in her name; the Defendant's daughter had ordered and had once paid for goods in her mother's name, and the Defendant never interfered in the house in the way of paying and receiving money.

Best C. J. summed up the whole of the evidence to the jury, but commented upon the fact of the Defendant saying the Plaintiff had better not go to law, or he might get 4s. in the pound; this, he thought, identified him with the business, and proved his knowledge of his wife's transactions; connecting this with the circumstance of his being in the house where the business was carried on, assisting in the business, and subsisting on the profits (for he had declared he received no wages), the learned Chief Justice put it to the jury whether any man could doubt that she was the agent of her husband, and directed them to find for the Plaintiff.

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The jury having found a verdict accordingly,

Wilde Serjt. obtained a rule *nisi* for a new trial, which he moved for on the ground, that the circumstances of the case shewed the Defendant's wife to be a sole trader, or that at all events it ought to have been left to the jury to say whether or not the credit was given to her alone. He cited *Bentley v. Griffith*. (a)

Vaughan Serjt., who shewed cause, characterised the conduct of the Defendant as a gross fraud, and insisted that the case though left to the jury with a strong expression of the opinion of the judge, was still correctly left to them upon a matter of fact which their verdict had determined; namely, the agency of the wife.

Wilde, in support of his rule, objected that no fact had been left to the jury, but that they had been directed to find for the Plaintiff without considering whether or not credit had been given to the wife alone. Supposing the husband's conduct afforded a presumption in law that the wife acted as his agent, there were many facts in the case on which the jury ought to have been required to consider whether or not that presumption was rebutted.

PARK J. There is always some difficulty as to the mode in which a presiding judge is to state his opinion to the jury. Now, though the Chief Justice expressed a strong opinion upon the present occasion, he summed up the whole of the evidence to the jury, and thereby left it in their power to form a judgment of their own.

In *Cox v. Kitchin* (b), *Buller* J. states very clearly, the limits within which rules for new trials are to be con-

(a) 5 *Taunt.* 356.

(b) 1 B. & P. 339.

fned,

finéd, and he lays it down, that the Court will not merely examine whether the Defendant be strictly liable in point of law, if the verdict is consistent with the justice and conscience of the case. The present verdict is so correct that no new trial ought to alter it. The only fault in the learned Chief Justice was, that he did not describe the whole transaction to the jury as a gross fraud. As justice has been fairly attained, it would be unwise to disturb the verdict upon any supposed nicety as to the way in which the case might have been put to the jury. When a judge is clearly wrong in point of law, or nonsuits improperly, that may be a ground for a new trial, but a strong expression of opinion, where the case calls for it, cannot be a ground of objection. In *Langfort v. Tilor (a)*, the husband was holden liable on no other ground than the fact of his cohabiting with his wife.

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BURROUGH J. I should have charged the jury in the same way as the Chief Justice has done, and we shall not send a case down for new trial when we see the verdict must go a second time the same way. The husband was present and assisting in the business, and therefore clearly liable to the Plaintiff's claim.

GASELEE J. expressed the same opinion.

BEST C. J. The husband took advantage of the trade that was carried on, by living on the profits, and a legal presumption arises from that circumstance, that the wife conducted the trade as his agent. In the present case he might have exonerated himself if he chose, by discontinuing the trade his wife car-

(a) 1 Salk. 113.

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ried on. Undoubtedly the presumption arising from his presence might have been rebutted, but there were no facts in the present case to repel the presumption. The bills of parcels, indeed, were made out to the wife, but the husband was at home, and assented to the delivery of the goods, which is a stronger case than that in *Comyns' Digest*, where the wife went out and ordered apparel by herself. The case of *Bentley v. Griffin* is not like the present. The clothes, it is true, were in that case furnished to the wife while living with her husband, but the contract was made privately, and the salesman was told not to bring them home while the husband was within. In the present instance there is nothing to repel the evidence of the husband's assent.

Rule discharged.

June 21.

BODY v. ESDAILE.

Where there were three verdicts; the first in favor of the Plaintiff, the second in favor of the Defendant by reason of a misdirection, and the third

IN this case there were three trials. The Plaintiff succeeded in the first; the Defendant succeeded in the second, by reason of a mis-direction of the Judge, and in the third, upon the merits.

By the rule for the first new trial, the consideration of the costs of the first trial was to be reserved; in the rule for the second, nothing was said about costs.

in favor of the Defendant upon the merits, and the rule for the first new trial reserved the consideration of costs, the Court allowed the Defendant to take the costs of the first or second, at his option, and the costs of the third.

The

The prothonotary having allowed the Defendant the costs of the two last trials,

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Vaughan Serjt. obtained a rule *nisi* for reviewing the taxation, on the ground that costs were never allowed where a verdict was obtained through the mis-direction of a Judge.

The prothonotary referred to *Shulbred v. Nutt* (a), and

Pell and *Wilde* Serjts., who shewed cause, argued, that if the Court would not allow the Plaintiff his costs upon the result of the first trial, but then reserved the consideration of them for the event, still less would they allow them when the event shewed that the merits were with the Defendant.

The Court took time to consider, desiring to assimilate the practice of the two Courts in these matters; and now

BEST C. J. said, it was not necessary upon this occasion to interfere with the practice, inasmuch as the Court had a discretion left in them by the terms of the first rule. They, therefore, allowed the Defendant his option to take the costs of the first or second trial, but not of both, and also the costs of the third.

(a) *Hullock on Costs*, 395.

1825.

June 21.

HOLMES, Demandant ; SETON, Tenant ; FOREMAN, Vouchee.

Recovery. Affidavit of presentation necessary to admit the word "advowson" in an amendment.

ROUGH Serjt. moved to amend a recovery, by inserting the word *advowson*, the deed to lead to uses, conveying all the *hereditaments* of the party, and all *tithes* in the parish named in the deed, and in the county of *Kent*.

The recovery was suffered in 1796, and an affidavit stated that possession had gone conformably to it ever since; but there was no allegation of any presentation having been made.

The Court said there was no doubt they had a right to include *advowson* under the word *hereditaments*, but they required an affidavit, stating by whom the last presentation was made, whether that presentation had taken place before or after the recovery.

The Court intimated that, after this term, they would take no recovery at chambers.

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HENRY V. TAYLOR.

June 22.

VAUGHAN Serjt. obtained a rule *nisi* to set aside a judgment, together with a grant executed by the Defendant for securing an annuity, and for delivering up and cancelling the securities, upon the ground that part of the consideration money was returned, and part retained.

The Defendant's affidavit stated, among other things, that for the purpose of redeeming certain annuities already granted, the consideration for which had been 630*l.*, for the purpose also of discharging arrears, and charges for insurance, the consideration was, upon the proposal of Messrs. *Howard* and *Gibbs*, increased to 910*l.*, and the annuities from 105*l.* to 130*l.*

That upon payment of the last-mentioned consideration, *Gibbs* handed to the Defendant a parcel of bank-notes, which he stated to be of the value of 910*l.*, and the Defendant immediately, without *Gibbs's* leaving the room, returned them to *Gibbs*, at his desire :

That *Gibbs* then handed him 1*l.* and a few shillings, as the balance of the account between them, from which account it appeared that *Howard* and *Gibbs* had obtained, in the manner above stated, about 165*l.* for themselves on this one transaction, though they had delivered no bill or statement of their charges for negotiating the business.

Wilde Serjt., who shewed cause against the rule, endeavoured to distinguish this from the preceding cases, by the circumstance that the money was returned to pay off a just debt, and he argued that the act of parliament was only directed against transactions in which the returning was the result of a previous agreement to enable the broker to retain more than his lawful commission.

The Court set aside an annuity where 910*l.*, the consideration money, was paid to the grantor, who immediately returned it all but 1*l.* to pay off preceding annuities, and 165*l.* which the attorney, who negotiated the affair, retained for his trouble.

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Vaughan, in support of his rule, referred to *Calton v. Porter* (a), *Gorton v. Champneys* (b), and *Williamson v. Goold*. (c)

BEST C. J. I am clearly of opinion that this annuity must be set aside. The ground alleged is, that a part of the consideration has been retained or returned; and either of those expressions may be properly applied to this transaction. But it is unnecessary to give any opinion on that part of the case, because there is an attorney's bill of 165*l.* for negotiating a loan of 910*l.*, and no explanation given of the items of which the charge is composed. Without explanation, it must be taken to be an unfair charge; and the attention of the attorney having been called to it by the rule which objects to the retainer, he was therefore bound to show that the charge was fair and reasonable. I fully concur with the cases which have been decided in this Court; but, without adverting to the authority of any case, this is clearly a retainer within the terms of the act of parliament.

PARK J. I am of the same opinion; and if we were to give the act the construction required on the part of the Plaintiff, we should, in effect, repeal it.

The act has been repeatedly and most deliberately considered, and it is impossible to entertain any doubt, unless at one sweep we say that all we have decided on the subject is wrong. It is indifferent whether the transaction be styled a returning or a retainer. The whole is a juggle and a mummery, contrived to elude the salutary provisions of the act.

The rest of the Court concurring, the rule was made
 Absolute.

(a) 2 *Bingh.* 370.

(b) 1 *Bingh.* 287.

(c) *Id.* 316.

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WYNNE v. GRIFFITH

June 22.

THE following case was sent for the opinion of this Court by the Master of the Rolls.

By indentures of lease and release, bearing date respectively the 1st and 2d of *June* 1750, the release being tripartite, and made between *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, spinster, daughter and heir apparent of the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, widow, of the first part; *John Salusbury* and *John Ellis* of the second part; and *Robert Wynne* and *Owen Holland* of the third part; and by a common recovery suffered in pursuance thereof, at the great session for the county of *Caernarvon*, on the 8th of *September* 1750, certain messuages, lands, and hereditaments, the estate and inheritance of the said *Humphrey Roberts*, and certain other messuages,

By deed of 1750, lands were limited to the use of such person as *H., D., M.,* and *C.* should by their joint deed, in the presence of two witnesses, appoint;

And for default of such appointment, to the use of such person as *H., D.,* and *M.,* in case they should all survive *C.,* by their joint

deed, in the presence of two witnesses, should appoint;

And in default of, and until such appointment,

Part of the premises to *C.* for life, without impeachment of waste;

And that part after her decease, and the rest of the premises, to the use of such person as *H.* by deed, in the presence of two witnesses, should appoint;

And for default of, and until such appointment, to *H.* and his heirs for ever.

By a settlement made in 1751 on the marriage of *M.* with *R.,* and attested by three witnesses, *H., D., M.,* and *C.* granted, bargained, sold, released, confirmed, directed, limited, and appointed the premises to *L.* and his heirs, to the uses, trusts, intents, and purposes thereafter expressed, concerning the same; among which was a term of 500 years to the use of *L.,* in trust to raise portions for younger children by sale or mortgage of the premises thereby granted and released, so as that thereby none of the prior estates in the premises should be impeached and incumbered; and

H., D., M., and *C.* covenanted that they (or one of them) were seised of the premises by them thereby granted and released for an absolute estate of inheritance, and that they would make such farther assurance of the premises thereby released, settled, or assured, as should be required:

Held, that the legal fee of the premises did not become vested in *L.*

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lands, and hereditaments, the estate and inheritance of the said *Catherine Roberts*, and certain other messuages, lands, and hereditaments and premises, therein described to have been theretofore purchased by the said *Humphrey Roberts*, and all other the messuages, lands, tenements, and hereditaments whatsoever of them the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, or any of them, in the parishes therein mentioned, and elsewhere in the county of *Caernarvon*, with their appurtenances, were limited to the use and behoof of such person and persons, and for such estate and estates, and subject to such provisoes, powers, limitations, trusts, conditions, and agreements, as the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, at any time or times thereafter during the term of their natural lives, by any their joint deed or deeds, writing or writings, to be by them duly executed in the presence of two or more credible witnesses, should *direct, limit, and appoint*; and in default of such direction, limitation, and appointment, to the use and behoof of such person or persons, for such estate and estates, and subject to such provisoes, powers, limitations, and agreements, as the said *Humphrey Roberts* and *Dorothy* his wife, and *Mary Roberts* (in case they should all of them survive the said *Catherine Roberts*) should at any time or times after the decease of the said *Catherine Roberts*, by any their joint deed or deeds, writing or writings, to be by them executed in the presence of two or more credible witnesses, *direct, limit, or appoint*; and for default of and until such direction, limitation, and appointment respectively as aforesaid, as to certain parts of the said hereditaments, to the use of the said *Catherine Roberts* and her assigns for her life, without impeachment of waste; and as to as well the said last-mentioned messuages, lands, and hereditaments, so limited to the said *Catherine Roberts*

berts for her life as aforesaid, from and after her decease, as also as to all the rest and residue of the said messuages, lands, hereditaments, and premises thereinbefore mentioned, whereof such common recovery should be had and suffered as aforesaid, and whereof no use was thereinbefore limited and declared, to the use and behoof of such person and persons, and for such estate and estates, and subject to such provisoes, powers, limitations, trusts, conditions, and agreements, as the said *Humphrey Roberts*, at any time or times thereafter, during the term of his natural life, by any his deed or deeds, writing or writings, to be by him duly executed, in the presence of two or more credible witnesses, or by his last will and testament in writing, to be by him the said *Humphrey Roberts* also duly executed, in the presence of three or more credible witnesses, should *direct, limit, or appoint*; and for default of and until such direction, limitation, or appointment, to the use and behoof of the said *Humphrey Roberts*, his heirs and assigns for ever.

By indentures, bearing date respectively the 1st and 2d days of *October* 1751, the former being a lease for a year, and made between the said *Humphrey Roberts* and *Dorothy* his wife, the said *Mary Roberts* and *Catherine Roberts* of the one part; and *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pearce Wynne*, of the other part; and the latter being tripartite, and made between *Robert Wynne* the elder and *Robert Wynne* the younger, son and heir apparent of the said *Robert Wynne* the elder, of the first part; the said *Humphrey Roberts* and *Dorothy* his wife, and the said *Mary Roberts* and *Catherine Roberts* of the second part; and the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne* of the third part; after settling divers messuages, lands, and hereditaments belonging to the said *Robert Wynne* the elder and *Robert Wynne*

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Wynne the younger, to the uses therein mentioned; it was witnessed, " that in consideration of a marriage then intended to be solemnized between the said *Robert Wynne* the younger and the said *Mary Roberts*; and of the provision thereinbefore made for her or her issue, and for the settling the messuages, lands, tenements, hereditaments, and premises thereafter mentioned, to the uses therein expressed concerning the same, the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, did grant, bargain, sell, release, and confirm, direct, limit, and appoint, unto the said *William Mostyn*, *John Lloyd*, *Robert Wynne*, of *Garthwin*, and *Pearce Wynne*, in their actual possession, being by virtue of the said lease for a year made to them by the said *Humphrey Roberts* and his wife, *Mary Roberts* and *Catherine Roberts*, as therein mentioned, the several messuages, lands, tenements, and hereditaments therein particularly described (and which, in fact, included the messuages, lands, tenements, and hereditaments comprised in the said indentures of the 1st and 2d of *June* 1750, and whereof such recovery was suffered as aforesaid), with their and every of their appurtenances, and all other the messuages, lands, tenements, and hereditaments, situate, lying, and being in the said county of *Caernarvon*, whereof or wherein the said *Humphrey Roberts* then was seised of any estate of inheritance, in possession, reversion, remainder, or use, and all the reversion and reversions, remainder and remainders, &c. ; and all the estate, right, title, interest, use, trust, possession, property, claim, and demand whatsoever, of them the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, or any of them, of, in, and to the same hereditaments and premises, and every of them, and every part and parcel thereof, to have and to hold the same premises so granted and released unto the said *William Mostyn*, *John Lloyd*, *Robert*
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bert Wynne (of *Garthwin*), and *Pearce Wynne*, their heirs and assigns for ever, to the several uses, intents, and purposes, and under the provisoes, powers, limitations, and agreements thereinafter mentioned, expressed, limited, and declared, of and concerning the same respectively; that is to say, in the meantime and until the said then intended marriage should take effect, to the same uses and estates as the said hereditaments and premises then respectively stood limited; and from and immediately after the solemnization of the said then intended marriage, as to part of the lands, hereditaments, and premises therein comprised, to the use and behoof of the said *Humphrey Roberts* and *Dorothy* his wife, and their assigns, for and during the term of their natural lives, and the life of the longer liver of them, without impeachment of or for any manner of waste, during the life of the said *Humphrey Roberts* only, for and as the jointure of the said *Dorothy*, and in full satisfaction, lieu, and bar of her dower or thirds, out of any real estate, whereof the said *Humphrey Roberts* then was or should at any time thereafter during her coverture be seised, and as for and concerning other part of the lands and hereditaments therein mentioned and described, to the use and behoof of the said *Humphrey Roberts* and his assigns, for and during the term of his natural life, without impeachment of waste, and as, to, for, and touching certain other parts of the lands, hereditaments, and premises therein mentioned, to the use and behoof of the said *Catherine Roberts* and her assigns, for and during the term of her natural life, without impeachment of waste; and as to, for, and concerning the several capital and other messuages, lands, tenements, hereditaments, and premises thereinbefore limited to the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, for their lives respectively as aforesaid, from and after the respective determination of the several estates thereof,

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to the use and behoof of the said *William Mostyn, John Lloyd, Robert Wynne (of Garthwin), and Pearce Wynne,* and their heirs, for and during the term of the natural lives of the said *Humphrey Roberts and Dorothy his wife, and Catherine Roberts* respectively, in trust only to preserve the contingent uses and estates thereafter limited and declared from being barred and destroyed; and to that end to make entries as often as occasion should require, but nevertheless to permit and suffer them the said *Humphrey Roberts and Dorothy his wife, and Catherine Roberts* respectively, to receive and take the rents, issues, and profits thereof, during their respective natural lives; and as to as well the said premises so limited to and to the use of the said *Humphrey Roberts and Dorothy his wife, and Catherine Roberts* respectively for their lives as aforesaid, from and after the several deceases of them, the said *Humphrey Roberts and Dorothy his wife, and Catherine Roberts* respectively, and as the said estates should end and respectively determine, as also the rest and residue of all and singular the said premises thereinbefore mentioned, and whereof no use was thereinbefore limited or declared, to the use and behoof of the said *Robert Wynne the younger and the said Mary his intended wife,* for the term of their natural lives, and the life of the longest liver of them, without impeachment of waste; and from and after the determination of that estate, to the use and behoof of the said *William Mostyn, John Lloyd, Robert Wynne (of Garthwin), and Pierce Wynne,* and their heirs, during the lives of the said *Robert Wynne the younger and the said Mary his intended wife* respectively, in trust, to preserve contingent remainders; and from and immediately after the decease of the survivor or longest liver of them, the said *Robert Wynne the younger and Mary his intended wife,* to the use and behoof of the said *William Mostyn, John Lloyd, Robert Wynne (of*

Garthwin) and *Pierce Wynne*, their executors, administrators and assigns, for the term of 500 years, from thence next ensuing; nevertheless upon the trusts, and for the intents and purposes thereafter mentioned; and from and after the determination of the said term and estate of and for 500 years, to the use of the first son of the said *Robert Wynne* the younger, by the said *Mary* his intended wife, lawfully to be begotten, and the heirs of the body of such first son lawfully issuing, and for default of such issue, to the use of the second and every other son of the said *Robert Wynne* the younger, by the said *Mary* his intended wife, lawfully to be begotten, severally and successively in tail, with remainder, to the use of the daughters of the said *Robert Wynne* the younger, by the said *Mary* his wife, in tail, with remainder to the use of the said *Humphrey Roberts*, his heirs and assigns for ever."

The term was then declared to have been created, in trust, to raise by sale or mortgage 6,000*l.* for the younger children, if any, of *Robert Wynne* the younger and *Mary* his wife, or so much, not exceeding 6,000*l.*, as *Robert Wynne* the younger should direct and appoint, so as thereby none of the prior estates in any part of the premises should be thereby impeached or incumbered during the continuance thereof, and for want of appointment of the whole 6,000*l.*, one moiety of the sum appointed was to be raised out of the premises granted and released by *R. Wynne* the elder and *R. Wynne* the younger, the other moiety out of the premises granted and released by *Humphrey Dorothy*, *Mary*, and *Catharine Roberts*, who covenanted that they were, or one of them was lawfully, rightfully, and absolutely seised of the premises by them thereof granted and released for an absolute and indefeasible estate of inheritance, and that they would make such further assurance of the premises by them thereby released, settled, or assured as by

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W. Mostyn, J. Lloyd, R. Wynne, and P. Wynne should be required.

The said indenture of the 2d day of *October 1751*, was duly executed by the said *Robert Wynne* the elder, *Robert Wynne* the younger, *Humphrey Roberts, Dorothy Roberts, Mary Roberts, and Catherine Roberts*, in the presence of, and the same was as to the execution thereof by the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts, and Catherine Roberts*, attested by three witnesses.

The marriage between the said *Robert Wynne*, the younger, and the said *Mary Roberts* was solemnised shortly after the execution of the said last-mentioned indenture.

There was issue of the said intended marriage, only one son, viz., *Robert Watkin Wynne*, and one daughter, viz. *Jane*, who afterwards became the wife of *John Wynne Griffith*.

The said *Catharine Roberts* died in the year 1763. The said *Humphrey Roberts*, in the year 1766 and the said *Dorothy Roberts* in the year 1767.

The said *Robert Wynne*, the younger, departed this life in the year 1782., leaving the said *Mary* his wife, and the said *Robert Watkin Wynne* his only son and heir at law, and the said *Jane* his daughter, and only other child him surviving, having by his will, dated the 24th day of *September 1767*, directed that the whole of the said portion of 6,000*l.* should be raised in favor of his said daughter *Jane*, and paid to her on her attaining the age of 21, or marriage as therein mentioned.

By an indenture of settlement made on the marriage of the said *Jane* with the said *John Wynne Griffith*, and dated the 15th day of *February 1785*, the said *Jane* assigned the said portion of 6,000*l.* to the said *Robert Watkin Wynne* and *John Lloyd, Robert Wynne, and Bennett*

nett Williams, Esqrs., upon trust, to pay 1,000*l.* (part thereof) to the said *John Wynne Griffith*, and on receipt of the sum of 5,000*l.* (the residue thereof) to invest the same in the purchase of lands of inheritance, and settle the same in strict settlement for the benefit of the said *John Wynne Griffith* and *Jane* his wife, and their issue as therein mentioned. But the settlement did not expressly authorise the said trustees to give discharges for the money.

By indentures of the 4th and 5th of *October* 1805, the said *Robert Watkin Wynne* conveyed an estate called *Plascnprwydd* estate, being part of the settled estates to the use of the said *John Wynne Griffith*, *Robert Watkin Wynne*, and *Edward Lloyd*, upon trust to sell, and out of the monies to arise thereby pay off the remaining portion of 6,000*l.*

By an indenture, dated the 24th day of *December* 1812, after reciting that the sum of 4200*l.*, the then remainder of the said portion, had been paid to the said *John Lloyd* the surviving trustee of the said marriage settlement of the said *J. W. Griffith* and *Jane* his wife, they, the said *John Lloyd*, *John Wynne Griffith*, and *Jane*, his wife, released the said *John Wynne Griffith*, *Robert Watkin Wynne*, and *Edward Lloyd*, and the estates comprised in the said indenture of settlement of the 1st and 2d days of *October* 1751, of and from the same.

The said *Robert Watkin Wynne* died in the year 1806, in the life-time of his said mother, *Mary Wynne*, and without having barred the entail, leaving *John Wynne*, his eldest son and heir at law, him surviving. The said *Mary Wynne* died in *January* 1814.

By indentures of lease and release bearing date respectively the 10th and 11th days of *March* 1814, and made and duly executed between the said *John Wynne*, who is therein described as the eldest son and heir at law of the said *Robert Watkin Wynne*, who was the only son of
Robert

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Robert Wynne by *Mary* his late wife, deceased, of the first part, *John Oldfield* of the second part, and Sir *Thomas Mostyn, Bart.*, of the third part, whereby, after reciting among other things, the said indentures of the 1st and 2d days of *October* 1751, and that the said *Robert Watkin Wynne* died in *March* 1806, without having done any act to bar the estate tail which became vested in him in remainder under the said last-mentioned indenture,

It was witnessed that the said *John Wynne* for barring and destroying the estate tail then vested in him, of and in all the messuages, lands, and hereditaments therein mentioned, and for assuring the same to the uses limited and declared of and concerning the same, did grant, release, and confirm unto the said *John Oldfield*, and his heirs, the said settled estates in the said county of *Caernarvon*, to hold the same unto and to the use of the said *John Oldfield*, his heirs and assigns for ever; to the intent that the said *John Oldfield* might be tenant of the præcipe to a common recovery to be suffered of the said premises, and which said recovery, when suffered, it was thereby declared should inure to the use of such person or persons and for such estate or estates as the said *John Wynne* should in manner therein mentioned appoint; and in default thereof, to the use of the said *John Wynne* and his assigns for his life, without impeachment of waste, with remainder to the use of the said Sir *Thomas Mostyn* and his heirs, during the life of the said *John Wynne*. In trust, nevertheless, for him the said *John Wynne*, with remainder to the use of the right heirs of the said *John Wynne* for ever. And which said recovery was afterwards duly had and suffered at the *Caernarvonshire* Great Sessions on the 4th day of *April* 1814.

By a decretal order of the High Court of Chancery made on the 5th day of *April* 1822, in a cause in which
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the said *John Wynne* was Plaintiff, and the said *John Wynne Griffith* and others were Defendants, it was declared that the said portion of 6,000*l.* had been fully paid and satisfied, and that the said term of 500 years had ceased and determined.

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The question was, whether under the said indentures of the 1st and 2d of *June* 1750, and common recovery suffered in pursuance thereof, and the said indentures of the 1st and 2d of *October* 1751, the legal fee of such of the estate and premises comprised in the said first-mentioned indentures as were settled and assured by the said last-mentioned indentures, became vested in the said *William Mostyn, John Lloyd, Robert Wynne* (of *Garthwin*), and *Pierce Wynne*; and if so, whether a jury would be directed to presume a reconveyance of the said legal estate?

Bosanquet Serjt. The principal question is, whether the deed of 1751 operated as an independent conveyance, or as an appointment under the deed of 1750? for if it operated as a conveyance, *Mostyn, Lloyd, R. Wynne, and P. Wynne*, did not take the legal estate in the premises.

It operated as a conveyance, for the following reasons: First, it does not recite, or even allude to the power in the deed of 1750, but professes to be made for the settling of the premises to the *uscs* therein expressed. Secondly, under the deed of 1750, of the four persons who are to concur in the joint appointment, two have an interest, as well as a power; the appointment would have been no execution of the power without the concurrence of those two; and it is certain, according to *Sir Edward Clere's case* (a), that where a party convey-

(a) 6 *Rep.* 18.

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ing has an interest, as well as a power, he shall be taken to convey by virtue of his interest, and not by virtue of the power. In *Cox v. Chamberlain* (a) the Master of the Rolls considered himself as bound by this principle, even where the conveyance expressed itself as having been made "in pursuance of all powers," &c. And according to the language of the Lord Chancellor in *Maunderell v. Maunderell* (b), the appointment having been executed by those who had an interest, as well as by those who had only a power, the power is gone. In *Roach v. Wadham* (c), there were express words of appointment, as well as of conveyance; it was for the benefit of all parties that the deed should operate as an appointment; there was a clear intention to that effect; and Lord *Ellenborough* laid it down as a question of intention. But, thirdly, it could never have been the intention of these parties, nor beneficial to them, that the deed of 1751 should operate as an appointment. If *Mostyn, Lloyd, R. Wynne, and P. Wynne* took the legal fee, it would have been unnecessary to make them trustees to preserve contingent remainders. (d) And the term which they take for raising portions to younger children would have been useless, inasmuch as it would have merged in their fee. The covenants profess to be made by parties having an absolute estate of inheritance, and the premises are respectively described as having been *granted* and *released*. The word *appoint* is only used once at the beginning of the deed, and that redundantly, after *grant, bargain, sell, release, and confirm*. But if it were necessary, the Court might distribute and marshal these words *reddendo singula singulis*; the words *grant* and *release* to those who have an interest, and the word *ap-*

(a) 4 Ves. 631.

(b) 10 Ves. 259.

(c) 6 East. 289.

(d) *Fearne. Cont. Rem.* 230.

point to those who have only a power. *Bulter's note Co. Lit.* 271. *b.* 3d part, 4th division.

Even if *Mostyn, Lloyd, R. Wynne*, and *P. Wynne* took the legal estate under a deed drawn in a blundering way, a re-conveyance may be presumed where they have never acted under the deed, though there may have been no adverse possession. The language of the Court in favour of such a presumption, in many of the cases is exceedingly strong; as in *Roe v. Reade (a)*, *Hilary v. Waller (b)*; of *Kenyon C.J.* in *Doe d. Bowerman v. Sybourn (c)*; of *Abbott C.J.* in *Doe d. Putland v. Hilder (d)*, and of *Le Blanc J.* in *Keene v. Deardon. (e)* According to all the cases, the question is, what was the predominant intention of the parties? and if it cannot be effectuated in any other way, a re-conveyance may be presumed. It never could have been intended, in the present case, that all the estates should be converted into trusts in case the marriage should go off.

Taddy Serjt. contra. The deed of 1751 operated only as an appointment, and *Mostyn, Lloyd, R. Wynne*, and *P. Wynne* took, as trustees, the legal estate in the premises.

If the deed had been intended as a conveyance of an interest, and not as an execution of a power, there would have been no reason for joining as grantors persons who had no interest, but who could only transfer by way of appointment: at the very outset of the deed the parties are made to *limit* and *appoint* the premises; the word *limit* is repeatedly employed, and the other words of conveyance are only added in the redundancy of con-

(a) 8 T. R. 122.

(d) 2 B. & A. 791.

(b) 12 Ves. 250.

(e) 8 East, 266.

(c) 7 T. R. 2.

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veyancing language. As to marshalling and distributing these words, that could only have been done if there had been a re-lessee as well as an appointee. [*Gaselee J.* There is not a word to show that the estates which before marriage were legal, should after marriage become equitable.] In *Tomlinson v. Dighton (a)*, *Parker C. J.*, lays down the principle in *Sir E. Cleré's* case, as follows: "That where according to the way the parties intended, the conveyance would have no effect at all, then it should pass another way; but where, should the estate pass the way the parties intended, the conveyance would have some effect, though not all that was intended by the parties, there it should pass no other way than the parties designed." Now that the deed of 1751 was intended to operate, as an appointment, is apparent from the circumstance that the execution by all the parties is attested by three witnesses; and it is equally clear, that in such a way the deed would have some effect, though, perhaps, not all that the parties intended. In *Roach v. Wadham*, the deed which was worded like the present, was holden to operate as an appointment. And the case of *Cox v. Chamberlain* does not apply, because the parties who were joint donees of a power, had both an interest also, which they declared their intention to convey. The question touching the destruction of a power by a conveyance from one who has an interest in the property to which the power applies, has never been determined in a court of law. With respect to the trust for supporting contingent remainders, and the term of 500 years, admitting them to have been unnecessary, they will not alter the general operation of the deed.

As to the supposed reconveyance, it cannot be presumed in the absence of any fact to support such a

(a) 10 Mod. 36.

presumption.

presumption. The enquiry as to this point in all the cases, is, what has been the conduct and beneficial interest of the parties? but there is nothing in the present case which can afford the Court any grounds for forming a judgment.

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Bosanquet was heard in reply, and

The following certificate was afterwards sent.

We have heard this case argued by counsel, and having considered the same, are of opinion that under the said indentures of the 1st and 2d June 1750, and common recovery suffered in pursuance thereof, and the said indentures of the 1st and 2d October 1751, the legal fee of such of the estate and premises, comprised in the first mentioned indentures, as were settled and assured by the last mentioned indenture, did not become vested in the said *William Mostyn, John Lloyd, Robert Wynne* (of *Garthwin*), and *Pierce Wynn*.

W. D. BEST.
 J. A. PARK.
 J. BURROUGH.
 S. GASELEE.

HOUSE OF LORDS.

BEST C. J. By an order of your Lordships of the 22d of June, the following question was submitted to the Judges, viz. Whether according to the true dominions of native and independent *Indian* sovereigns, by *British* subjects domiciliated and residing within such dominions, is not limited to 12 per cent.

The rate of interest for loans advanced within the dominions of native and independent *Indian* sovereigns, by *British* subjects domiciliated and residing within such dominions, is not limited to 12 per cent.

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struction of the 30th section of an act passed in the 13th year of the reign of his late Majesty, entitled, "An act for the establishing certain regulations for the better management of the affairs of the *East India Company*," the same limits the rate of interest to be taken for loans of any monies to twelve pounds for one hundred pounds by the year, such loans being made or advanced *within the dominions of a native independent Sovereign by British subjects domiciliated and residing within such dominions?* The Judges having maturely considered this question, have directed me to inform your Lordships that they are unanimously of opinion, that the act referred to, in the question submitted to them, does not limit the rate of interest on loans made within the dominions of a native independent Sovereign by British subjects domiciliated, and residing within such dominions, to twelve pounds for one hundred pounds by the year. In the absence of the Lord Chief Justice of the King's Bench (a), I will humbly submit to your Lordships the grounds on which my opinion is founded: Not expecting that it would be my duty to state to your Lordships the opinion of the Judges, I have had no opportunity of submitting to them the reasons that I should offer to your Lordships in support of their opinion; your Lordships will be pleased to consider me alone responsible for the observations that I am about to make.

The words of the statute on which your Lordships' question is raised, are, "And be it further enacted, by the authority aforesaid, that no subject of his Majesty, his heirs and successors in the *East Indies*, shall upon any contract which shall be made from and after the 1st day of *August 1774*, take directly or indirectly for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of twelve pounds

(a) *Abbott*: C. J. was engaged in a trial at the Admiralty Sessions.

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for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever made after the time aforesaid, for payment of any principal or money to be lent, or covenanted to be performed, upon or for any usury whereupon or whereby there shall be reserved or taken above the rate of twelve pounds in the hundred as aforesaid, shall be utterly void; and all and every such person or persons whatsoever, who shall upon any contract to be made after the 1st day of *August* 1774, take, accept and receive by way or means of any corrupt bargain, loan, exchange, shift, or interest of any wares, merchandizes, or other thing or things whatsoever or by any deceitful way or mean, or by any covin, engine, or deceitful conveyance for the forbearing or giving day of payment for one whole year of and for their money or other thing, above the sum of twelve pounds for the forbearing of one hundred pounds for a year, and so after that rate, and for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence treble the value of the money, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted, with costs of suit; one moiety whereof shall be to the said united company, and the other moiety to him or them who will sue for the same, in the said Supreme Court of Judicature, at *Fort William* in *Calcutta*, or in the Mayor's Court in any other of the said united company's settlements where such offence shall have been committed, by action of debt, bill, plaint, or information, on which no essoign, wager of law, or protection shall be allowed; and in case no such action, bill, plaint, or information shall have been brought and prosecuted with effect within three years, that then it shall and may be lawful to and for the party aggrieved to sue and prosecute for recovery of all sums of money

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paid over and above such rate of interest." 13 Geo. 3. c. 63. s. 30.

This is a penal statute, and must according to the rules by which acts of parliament are construed, receive a strict interpretation. Our law will not allow of constructive offences; no man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute imposing such penalty. The meaning of the words of an act of parliament is to be ascertained from the subject to which it refers, so that the same words receive a very different construction in different statutes. The intent of the legislature is not to be collected from any particular expression, but from a general view of the whole of an act of parliament. Your lordships will perceive that these are not merely technical rules established by lawyers for the determination of questions arising on statutes, but that they are maxims of common sense, the observance of which is necessary to conduct us to a right understanding of every kind of written instrument.

The statute on which this question arises is a law of usury. The supposed policy of the Usury Laws in modern times is to protect necessity against avarice, to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labour and encrease national wealth, and to enable the State to borrow on better terms than could be made if speculators could meet the minister in the money market on equal terms. Laws framed on these principles are limited to the countries in which they are made. The foreign borrower wants not the protection of our laws, nor can it be extended to him. We may declare a contract void, but notwithstanding such declaration it may be enforced in the courts of the country in which it is made, if it be not repugnant to the laws of that country. We leave the industry of other countries

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to the care of their respective governments. I will not say that it is impossible that our capitalists may be tempted by the high rate of interest in other countries to send money out of their own. I believe that our own government and commerce was inconvenienced by the large loans made by the servants of the *India* Company to the Nabob of *Arcot*. But the risque of loans to persons living out of the reach of British laws is so great, that, in general, much capital will not be drawn by them out of the country. Should any evil arise from them, it is not to be remedied by fixing a rate of interest, but by prohibiting them altogether, or allowing such only as are made under a licence from Government. This is the mode in which the Government in *India* has proceeded in such cases.

In 1719, and repeatedly since, they have issued orders prohibiting British subjects from lending money to independent sovereigns without their authority. (Letter from the Court of Directors. Appendix. *Burke's* Speech on the Nabob of *Arcot's* Debts, No. 9.) and these orders have since been enforced by act of parliament, (57 G. 3. c. 142. s. 28.) But if you allow loans to be made to persons resident in foreign states, it seems to me to be as absurd to fix the rate of interest as it would be to establish a maximum on the price of goods exported: I should observe that these regulations were made, more for the purpose of keeping under the constant controul of Government the intercourse between British subjects and the native princes than of preventing the loan of money to those princes. An unrestrained intercourse between the subjects of one state and Government of another can never be permitted, particularly between the subjects of a Government administered-as that of our possessions in *India* was, and the native sovereigns of that country. The history of the *Carnatic* informs us of the dangerous intrigues that such inter-
course

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course had occasioned: but whenever loans are allowed, either to native princes or their subjects, it must be to the advantage of the *British* empire, as well as of the individual lender, that the highest rate of interest should be obtained for them. I have been favoured with the copies of two orders made by the Government of *Fort William*, — one on the cession of some territory of *Dowlut Rah Scindiah* to the *East India* Company, in 1793, and the other on the cession of certain provinces by the Nabob Vizier to the Company, in 1803. These orders show that interest, at the rate of 25 *per cent.* in some instances, and 30 *per cent.* in others, was taken by the orders of the Company. According to these orders, after the states were brought under *British* law, 12 *per cent.* only was to be allowed for the loan of money. These orders prove, from the highest authority, that the rate of interest fixed by our laws is not a just rate in countries where the lender has not the security which such laws afford him. The rate of interest must be regulated according to the hazard attending the loan, and the value of the money in the country in which it is lent. In our own empire different rates of interest are established; there is one rate of interest in *Great Britain*, another in *Ireland*, another in the *West Indies*, and another in the *East Indies*. We must presume that whatever rate of interest is allowed in any country, is considered by the government of that country as a just compensation for the risque and use of the money lent; and it would be strange if our laws should prohibit a *British* subject from employing his capital to the same advantage, in any foreign country, as the subjects of any other state may employ their capital in such countries. Considering the spirit of this law, as the words *British subjects in the East Indies* are satisfied by *British* subjects residing and making loans in our own settlements in the *East Indies*, I think this clause of the act was not intended

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tended to include, nor can, consistently with any sound legal principle of construction, be made to include loans in foreign states to the subjects of such states. There are other acts of parliament in which the words *British subjects in the East Indies*, include *British subjects in any part of India*, because the object which the legislature had in view in passing those acts could not be attained without putting this construction on those words; and therefore it must be presumed that it was the intention of the legislature that such a construction should be put on them. Thus, the receiving presents by any *British subject* holding any office under His Majesty or the Company in the *East Indies* (1 G. 3. c. 25. s. 45.); the lending money by a *British subject residing in India* to a foreign company or merchant, to purchase goods in *India* (21 G. 3. c. 65. s. 29.); the being in the *East Indies* without proper authority, (9 G. 1. c. 26. s. 6.) are acts all equally injurious to *British interests*, whether they are done within the settlements of the Company, or the states of independent princes. The prevention of these offences, in every part of *India*, is clearly within the intent of the legislature: this intent is further proved by a provision in the statute of G. 1. that offenders under that act may be tried in any court of *Westminster*; by a provision in the 21 G. 3. that the penalties imposed by that act may be recovered in any court in the *East Indies*, or in the *King's Bench at Westminster*; and by a general clause in 24 G. 3. c. 25. s. 44. making all persons amenable to all courts of justice both in *India and Great Britain*, for offences committed in the territories of any native prince. If the legislature had intended that the 13 G. 3. should apply to loans made in foreign countries, the same provision would have been made for the recovery of the penalties in any court in *England or India* as is to be found in the acts that I have referred to. Offences cannot, without an express provision of the legislature,

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be tried by any Court but that which has jurisdiction in the place where they were committed. All offences are said to be local: thus, before the 28 *Hen. 8. c. 15.* offences committed on the high seas could not be tried on shore; and before the 24 *G. 3.* no offences in *India*, except such for which a trial in another country had been particularly provided, could be tried in any other settlement except that in which such offences were committed. If, therefore, the lending money at more than 12 per cent. interest to the subject of a foreign prince, within the dominions of that prince, was made an offence by the 13 *G. 3.*, the person who committed such offence could never be tried or punished for it.

But let me request Your Lordships to apply the last rule to which I ventured to call Your Lordships' attention to this act of parliament. Let us look at the whole of the act, and form our opinion of its meaning from a due consideration of every part of it. The penalties imposed by the act are to be sued for in the *Supreme Court of Judicature at Fort William* which your Lordships know has jurisdiction over the provinces of *Bengal, Bahar, and Orissa*, (13 *Geo. 3. c. 3. s. 14.*) "or in the *Mayor's Court* in any other of the said united *Company's Settlements* where such offence shall have been committed." — My Lords, to my humble judgment, these words clearly shew that the legislature only intended to fix a rate of interest within these settlements. If the offenders against the act are tried in any other place than in the *British* settlement where the offence was committed, they are tried without lawful authority for such trial, and against a positive provision of the statute creating the offence. — As the supposed policy on which usury laws are founded applies only to loans made within the realm; — as there is nothing to be found in the 13 *Geo. 3.*, which shews that the legislature was proceeding on any other principles than those on which the
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the ordinary usury laws stand; — nor any thing from which it appears that its provisions were to be extended beyond our own states; — as I cannot suppose the legislature meant to act so absurdly as to create offences and make it impossible to try the offenders; — I concur, in opinion, with the other Judges, that the 13 *Geo. 3.* does not limit the rate of interest on loans made within the dominions of native independent sovereigns by *British* subjects domiciliated and residing within such dominions.

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END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

1825.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

In the Sixth Year of the Reign of GEORGE IV.

DOE dem. CLARK and Others v. SPENCER.

Nov. 10.

THE Plaintiff recovered a verdict in this ejectment on the demise of the provisional assignee of the Insolvent Debtors' Court, although it was objected at the trial, that under the 1 G. 4. c. 119. such assignees had no title to sue. By section 4. of that act it is enacted, "That each petitioner to the Court shall, at the time of subscribing his petition, duly execute a conveyance and assignment in such manner and form as the said Court shall direct, of *all* the *estate*, right, title, interest, and trust of such prisoner, except the wearing apparel, bedding, and other necessaries of such prisoner and his or her family, not exceeding in the whole the value of 20*l.*, so as to vest all such real and personal estate and effects in the *provisional* assignee of the said Court."

Under 1 G. 4. c. 119. the provisional assignee of the Insolvent Debtors' Court may, without application to that Court, sue in ejectment for property assigned to him.

And by the 7th section of the act it is enacted,

"That

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“ That when the said Court shall adjudge any prisoner to be entitled to his discharge, such Court shall appoint a proper person or persons to be assignee or assignees of the estate and effects of such prisoner for the purposes of this act; and when such assignee or assignees shall have signified to the said Court their acceptance of the said appointment, every such prisoner’s estate, effects, rights, and powers vested in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee to such assignee or assignees, in trust for the benefit of such assignee or assignees and the rest of the creditors of every such prisoner, in respect of or in proportion to their respective debts, according to the provisions of this act. And such assignee or assignees is and are hereby fully empowered to sue from time to time as there may be occasion, in his or their own name or names, for the recovery; obtaining, and enforcing any estate, effects, or rights of any such prisoner.”

By the 11th section of the act it is also enacted, “ That no suit in law be proceeded in further than an arrest on mesne process, or suit in equity be commenced by any assignee or assignees of any such prisoner’s estate and effects, without the consent of the major part in value of the creditors of such prisoner, who shall meet together, pursuant to a notice to be given at least fourteen days before such meeting, in the *London Gazette* or other newspaper which shall be published in the neighbourhood of the last residence of such prisoner, for that purpose, and without the approbation of one of the commissioners of the said Court.”

Wilde Serjt. moved for a rule *nisi* to set aside the verdict and enter a nonsuit instead. He argued, as it had been contended at the trial, that under this act the provisional assignee had not authority to sue, or, at all events,

events, not without the order of the Insolvent Debtors' Court, of which no proof had been adduced at the trial.

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BEST C. J. This was an action of ejectment brought on the demise of the provisional assignee of the Court of Insolvent Debtors. The objection made at the trial was, that the provisional assignee was only to take charge of the effects until the insolvent was adjudged entitled to relief, and an assignee was appointed by the court.

I was of opinion that until an assignee was appointed by the court, and the provisional assignee had assigned to the one so appointed, the legal estate in any lands belonging to the insolvent was vested in the provisional assignee, and that he might maintain an ejectment for such lands. We have now another objection presented to us, namely, that it was incumbent on the provisional assignee to prove at the trial that he had the authority of the Court of Insolvent Debtors, and of a majority of the creditors, for bringing the action, and that without such proof he could not recover. I do not think that there is any weight in either of the objections.

With respect to the first, it will appear from the 1 G. 4. c. 119. and the 3 G. 4. c. 123. that the real estate is completely vested in the provisional assignee, by the assignment made to him, and remains so until it is divested by his assignment to the assignees named by the court, and these assignees have accepted such assignment. Unless there be something to control a provisional assignee in the exercise of this right, he may maintain any action that it may be necessary to bring for the purpose of getting possession of the real or personal property of the insolvent; and section 4. of the 1 G. 4. directs that the insolvent at the time that he subscribes the petition for his discharge, shall make an assignment to vest all his real and personal estates in the provisional assignee, with a proviso that in case the insolvent does

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not obtain his discharge, the assignment shall be void. The object of this section was to prevent the estate of the insolvent from being wasted between the time of his applying for relief and the Court of Insolvent Debtors declaring that he is entitled to it. This object would be defeated if the provisional assignee could not maintain actions for the recovery of the insolvent's property. The seventh section says, that when the court shall have adjudged that a prisoner is entitled to his discharge, it shall appoint proper persons to be assignees of the insolvent's effects; and that when such assignees shall have signified to the court their acceptance of the appointment, then the provisional assignee is to assign the estate *vested in him* to the assignees appointed by the court. By the words of this section, the estate, by the assignment of the insolvent under the 4th section, remains in the provisional assignee, until he, by order of the court, conveys it to the assignee appointed after the court has adjudged that the insolvent is entitled to his discharge.

The next objection is, that although the estate is vested in the provisional assignee, the eleventh section of the 1 G. 4. and the second section of the 3 G. 4. make it necessary for him to prove at the trial that he was authorized by the court for the relief of insolvent debtors, and by the major part in value of the creditors of such insolvent to bring the action. By these sections the legislature did not intend to increase the expence of suits brought for the benefit of insolvent estates, or to give any advantage to those who endeavour to withhold from the assignees what belongs to such estates. If we put the constructions on those acts that the Defendant contends for, both those consequences will follow. The legislature intended to prevent the insolvent's estate from being spent in useless litigation, and to protect a provisional assignee from actions for what he had done

done under the assignment, should it become void from the court for the relief of insolvent debtors refusing to discharge the insolvent.

If an action is brought without the proper authority, this Court might perhaps stop it on motion, or the Insolvent Debtors' Court might order their officer to suspend or discontinue it. I doubt, however, whether either court should interfere on the application of a Defendant. He can in no way avail himself of this provision in the act, as it was not made for his benefit. I am convinced he can make no use of it at the trial of an ejectment brought against him.

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Rule discharged.

CHOLMELEY v. PAXTON.

Nov. 12.

THIS was a writ of formedon. The pleadings, which were of enormous length, may be stated in substance as follows; The demandant in his count set out so much of the will of Sir Henry Englefield as shewed that an estate was devised by him to Lord Cadogan and Sir Charles Buck, in trust for the eldest son of Sir H. Englefield for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of his eldest son in tail male; remainder to his second son for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of his trust, by the same conveyance, sold and conveyed the timber, and received the money for it:

Held, that the power was not well executed.

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second son, in succession, in tail male; remainder to the demandant's mother for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in succession, in tail male. The count then shewed the death of the testator and his wife (for whose benefit a term was created, which by her death was determined), the death of the testator's two sons without issue, the death of the demandant's mother, and that the demandant was her eldest son, in which right he claimed the estate.

The tenants in their eighth plea, on which the question chiefly turned, stated that the trustees and the survivors of them were empowered by the will at the request of any person in possession as tenant for life to sell the estate for such price as they should think reasonable, and *for the purpose of such sale* to revoke the uses expressed in the will, and to declare other uses, and to lay out the proceeds in the purchase of other lands which they were to hold to *the same uses as the land devised*, and to receive and give a discharge for the purchase money which they were to lay out in real or government securities, until a proper estate could be purchased, and in the mean time to pay the interest and dividends to the tenant for life.

The plea then stated, that in pursuance of this power Lord *Cadogan*, after the decease of Sir *C. Buck*, at the request of Sir *H. C. Englefield*, the first tenant for life, sold the estate to *Byam Martin* for 13,400*l.*, which Lord *Cadogan* judged to be a reasonable price for the same, and then set out so much of the deed to *Byam Martin* as revoked the former uses of the will, and conveyed the estate to a person in trust for *Byam Martin* in fee, for the price of 13,400*l.*

The plea next deduced the title from *Byam Martin* and his trustee to the tenant. *Profert* was made of the deed

deed of conveyance from Lord *Cadogan* to *Byam Martin*. In the replication, oyer was demanded of that deed. The deed was then set out, from which it appeared that Lord *Cadogan* sold the estate, *exclusive of the timber* growing upon it, for 13,400*l.*, and that such timber was sold by Sir *H. C. Englefield* to *Byam Martin* for 2448*l.*, which timber Sir *H. C. Englefield* by the same deed conveyed to *Byam Martin* and his heirs, and the receipt of which 2448*l.* Sir *H. C. Englefield* acknowledged in the body of the deed, and also by a receipt on the back of it.

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The replication also stated the will of Sir *H. C. Englefield*, and shewed from that will that the power was what it was stated to be in the eighth plea, and brought under the view of the Court the supposed imperfections in the execution of the power by the trustees selling only the land and allowing the tenant for life to sell the timber on it, and to receive the price thereof. To this replication there was a general demurrer and joinder.

The case was argued in *Trinity* term.

Peake Serjt. in support of the demurrer.

The power was well executed. The tenant for life having an estate without impeachment of waste, had a right to sell all the timber, and convert it to his own purposes. The estate itself could not be sold without his consent, and he was entitled to receive the produce of the timber. In *Lady Plymouth v. Lady Archer* (a), *Burges v. Lamb* (b), and *Woolf v. Hill* (c), Lord *Eldon* held that the tenant for life was entitled to sell the timber upon an estate purchased in lieu of one in which he had been tenant for life without impeachment of waste. If, therefore, he might cut, either upon the first property,

(a) 1 *Br. Cb. Rep.* 159. (b) 16 *Ves.* 174. (c) 1 *Swanst.* 149.

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or that which was received instead, it is difficult to say why he might not sell.

But, at all events, the conveyance by Lord *Cadogan* operated as a revocation of the uses of the will, and thereby destroyed the Plaintiff's claim.

Cross Serjt. contra. The tenant for life was not the owner of the timber, but had only the liberty to cut, without being subject to an action; *Levis Bowles's* case (a); and the trustee having conveyed the soil only, without the timber, has not executed the power; for under that power he was not only to exercise a judgment as to the price to be paid for the property, but to purchase another in exchange, and this would be less valuable than the property sold, by the amount of the price of the timber. It might happen that the timber might be worth more than the rest of the property. Even with regard to the right of cutting down, it is by no means clear that a tenant for life, without impeachment of waste, can do more than cut in a husbandman-like manner. *Bridges v. Stephens.* (b)

Cur. adv. vult.

BEST. C. J., after stating the pleadings (as in the beginning of the case) now delivered the following judgment:

From the deed set out in the replication it appears that Lord *Cadogan* had nothing to do with the sale of the timber, and that he formed no opinion as to the reasonableness of the price paid for it, nor ever received or had any controul over it: although it is conveyed as real property to the heirs of the purchaser, the trustee does not join in that conveyance; he does not convey the woods, but only the land on which the woods stand.

(a) 11 *Rep.* 79.

(b) 2 *Swanst.* 150. n.

This is at least the effect of the deed; for although a conveyance of the land would convey the timber, if there were nothing to control the effect of such conveyance, here it is controlled by the conveyance of the wood in the same deed.

It seems to have been supposed that as Sir *H. C. Englefeld* was not impeachable of waste, the woods whilst standing and forming part of the estate were his property, and he is by the deed the only party who conveys the woods.

The question, therefore, is, whether Lord *Cadogan* having sold and conveyed the estate, without the timber standing on it, has executed the power so as to convey the estate or any part of it, or any interest in it.

A tenant who is not impeachable for waste, may cut down all the timber on the estate, and the moment it is severed from the ground he may convert it to his own use. But a tenant without impeachment of waste, has no interest in the woods while standing, nor can he convey any interest in them to another. A tenant in tail is unimpeachable of waste; but if standing woods are sold by him, and these are not cut down during his life, the property in them descends with the estate, and the vendee cannot cut them. The tenant in tail, or other tenant unimpeachable of waste, may give authority to cut down timber, but such authority conveys no interest, and is revoked by the death of the person by whom it is given.

It may be said, that if a tenant unimpeachable of waste might cut every tree on the estate, as the estate will sell better with the trees uncut than when quite denuded of timber, is it not for the advantage of the reversioner that the tenant for life should give up his right of cutting the timber, and be permitted to sell it with the estate? Whether this would be for the advantage of the reversioner must depend upon many cir-

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circumstances, such as the quantity of timber and the means which the tenant for life may have of cutting it. He may die before he can cut the whole or a considerable part, or even a single tree. Although a tenant in tail may bar remainders by a recovery, yet the Court of Chancery will not allow a trustee who has lands in trust for one and the heirs of his body, with remainder over, to convey to such person in fee, because such a conveyance would prevent the reversioner from claiming the estate if the tenant in tail should die before he could suffer a recovery. (a) It is not fit, therefore, that a tenant for life or trustees should be permitted to do what may prejudice the reversioner without his concurrence; besides, in the sale of growing timber, trees of the value of a shilling are included, and although a tenant unimpeachable of waste would not be liable to any action for cutting such small trees, a court of equity would prevent him from taking such as were not ripe for cutting.

The tenant unimpeachable of waste by selling the timber standing, gets an advantage over the reversioner which he otherwise could not be permitted to obtain. (b) It does not appear that any of this timber was felled during the life of Sir *H. C. Englefield*. It was a part of the estate at the time of the sale, and may be a part of the estate at this moment. This part of the estate has not been conveyed by the trustees, or by any other person that had authority to convey it: is then the sale of an undivided part of the estate (for the trees whilst standing are a part), a good execution of the power as to the part sold? The power of sale in the will, is in these words: "To make sale and dispose, or to convey in exchange of or for any other manors, all or any part or parts of the messuages aforesaid, with the appurtenances either *together* or in *parcels*, for such price or prices in

(a) 1 *Eq. Ca. Abr.* 395.

(b) 2 *Bro. P. C.* 88.

money or any other equivalent: as to them, the trustees should seem reasonable." The trustees must substantially comply with the authority given to them; if they do not, the act done by them will not be a good execution of the power, and the conveyance will be altogether void. They might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold; that is the extent of their authority. They cannot sell *part* of a parcel. They must not sell the land without the timber, or the timber without the land on which it grows. The sale of the one without the other would be a cause of confusion and litigation, which could not fail to be injurious to both the vendor and vendee, and such a sale is a material departure from the power, injurious to the reversioner, and therefore altogether void.

When a tenant for life requires an estate to be sold under such a power as this, he places himself in the situation of the owner of an estate decreed to be sold by the Court of Chancery, and he must, like him, sell it with the timber: *Burgess v. Lamb.* (a) As the estate to be purchased with the proceeds of the sale must be conveyed to the same uses as the old estate, the tenant for life will have a right to cut down the timber on the purchased estate, and that is a just equivalent for his not cutting the timber on the first estate. It was not attempted at the bar to prove that although the timber was not conveyed, the conveyance of the land on which such timber was standing, might be supported. We presume that such an argument was considered untenable. My brother *Peake* seemed to feel that the sale was not warranted by the power, and he argued, that although the sale might not be good, yet the trustees having a power to revoke the uses in the will, and the

(a) 16 Ves. 174.

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surviving trustee having revoked the uses, the demandant had no title to support his formedon. But they are only to revoke the uses for *the purpose of a sale or exchange*; that is, for purpose of such a sale or exchange as is consistent with the legal power. The legal estate is in the *cestui que use*, and nothing remained in the trustees but a conditional power. The will authorizes the trustees to sell on the request of the tenant for life in possession, and then it says, "and to that end, (that is, that they make a sale), they may revoke and make void the uses on which this estate is devised to them." If they had revoked the uses by one deed, and conveyed the estate by another, the two deeds would be considered as parts of the same transaction, and if the conveyance had been void, the revocation of uses preparatory to the conveyance would have been void also. Although the case of *Doe d. Willis v. Martin* (a), is in many of its circumstances distinguishable from the present, all the Judges who decided that case, lay down a principle which governs this. Lord *Kenyon* says, "I am most clearly of opinion, taking the whole of the power together, that the deed was no legal revocation: they had only a power to revoke on condition." *Ashurst J.* says, "Their interests (the interests of the *cestui que use*), could only be *divested* by a due execution of the power of revocation: a bad execution has no operation whatever." *Buller J.* "The power of revocation was *conditional* only, but that condition not having been complied with, the *deed of revocation is void*." *Gross J.* "This was merely a conditional power which must be considered altogether, and no part of the execution can be good unless the whole be so." It is true, that in *Doe d. Willis v. Martin*, the trustee who made the conveyance was an infant, and it was thought the case was not within the

(a) 4 T.R. 39.

7 Ann. c. 19. which gives validity in certain cases to the conveyances of infant trustees. But this was not the reason given by any one Judge for his judgment: they all rest their judgment on this, that although the revocation of the uses and subsequent conveyance of the property were by different instruments, yet all the acts done were in execution of the power, and that not being well executed, every deed made for the purpose of executing that power was void. In the present case the revocation of the uses and the conveyance of the estate are done at the same time and by the same deed. The remainder, which under the will vested in the demandant, could only be divested by a legal revocation of uses by the trustees, and as there was no good revocation of the uses, the demandant's estate remained undisturbed, and the trustee had no legal interest to convey.

We are therefore of opinion, that the eighth plea is not supported by the deed which is set out on oyer, and that the demandant is entitled to our judgment on the demurrer to the replication to that plea.

Judgment for Demandant.

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FLIGHT v. BUCKERIDGE.

Nov. 12.

COVENANT on an annuity deed, between *Richard Buckeridge*, of the first part; *George Buckeridge*, of the second part; *Banister Flight*, the Plaintiff, of the third part; *Alexander Wylie*, *Edward Greenhill*, and

A memorial of an annuity deed, enrolled within thirty days after execution of the deed by the

grantee, is good, though enrolled before execution by the grantor.

If the witnesses to the deed are accurately described in the memorial, it is sufficient, though they did not see the parties execute.

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William Roberts James, of the fourth part; *Alexander Wylie*, and *Catherine*, his wife, and *Alexander Forrest*, of the fifth part; and *Thomas Flight*, of the sixth part.

Breach, non-payment of the annuity.

The Defendant pleaded among other pleas the following, (which was the fourth,) — that although the Plaintiff within thirty days after the execution of the indenture in the declaration mentioned, by *Richard Buckeridge*, by the said Plaintiff, by *Alexander Wylie*, by *Edward Greenhill*, by *William Roberts James*, by *Catherine Wylie*, and by *Alexander Forrest*, caused a memorial thereof, and of certain other instruments and assurances for granting and securing the said annuity, to be enrolled in the High Court of Chancery as follows, that is to say,

“ A memorial to be enrolled in his majesty’s High Court of Chancery, pursuant to an act of parliament made and passed in the fifty-third year of the reign of his late majesty king *George* the third: Date of instrument; 2d Nov. 1821: Nature of instrument; indenture of grant and demise: Names of parties: (they were here set out at length:) Names of witnesses and description: *Daniel Collins*, 28, *Cursitor Street*, *Chancery Lane*, and *William Wadley*, clerk to Mr. *Wilmott*, No. 1, *Tanfield Court*, *Temple*: Name or names of persons by whom annuity or rent charge to be beneficially received: *Banister Elight*: Person or persons for whose life or lives the annuity or rent charge is granted: for the term of one hundred years thenceforth, if the said *Richard Buckeridge* shall so long live: Consideration and how paid: (it was here set forth in detail:) Amount of annuity or rent charge; 400*l.* a year: Enrolled in his majesty’s High Court of Chancery, at six o’clock in the afternoon of the 1st day of *December*, in the year of our Lord 1821 :”

Yet the said Defendant did not execute the said indenture

indenture in the said declaration and memorial mentioned, until long after the enrolment of the above mentioned memorial, to wit, until three months after such enrolment, to wit, on the 30th day of *March*, in the year of our Lord 1822: And the said Defendant further saith, that no memorial whatsoever of the said indenture in the said declaration mentioned, was enrolled in the High Court of Chancery, within thirty days after the execution of the said indenture by the said Defendant, according to the directions of the said act of parliament, made and passed in the fifty-third year of the reign of his late majesty king *George* the third; whereby the said indenture in the declaration mentioned, is null and void, as against the said Defendant.

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The fifth plea was,—that although the Plaintiff within thirty days after the execution of the indenture in the declaration mentioned, caused a memorial thereof and of certain other instruments and assurances, for granting and securing the annuity to be enrolled in the High Court of Chancery, as follows, (setting out the memorial, as in the preceding plea),

Yet the Defendant did not execute the indenture in the memorial and declaration mentioned, in the presence of *Daniel Collins* and *William Wadley*, as in the said last mentioned memorial is mentioned, either at the time the said indenture bears date, or at any time before or since the enrolment thereof; whereby according to the said act of parliament made and passed in the fifty-third year of the reign of his late majesty king *George* the third, the indenture in the declaration mentioned, is null and void as against the said Defendant.

The Plaintiff demurred to the fifth plea, and assigned the following causes of demurrer; — that the averment in that plea, that the said Defendant did not execute the indenture

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indenture in the presence of *Daniel Collins* and *William Wadley*, and the issue tendered thereby, was immaterial and irrelevant to the matter in dispute between the Plaintiff and the Defendant; and that it did not appear, nor was it stated in the said plea, that the memorial in that plea mentioned did not contain the names of all the witnesses to the indenture.

To the fourth plea the Plaintiff replied, that a memorial of the indenture was within thirty days after the execution thereof, enrolled in the High Court of Chancery pursuant to the statute. He then set out the memorial, and concluded, — that the said memorial did and does duly contain the date of the said indenture, the names of all the parties and of all the witnesses thereto; of the person for whose life such annuity was granted; of the person by whom the same was to be beneficially received; the pecuniary considerations for the granting of the same; and the annual sum to be paid; in manner and form, as in and by the statute in that case made and provided, is required.

The Defendant rejoined to the replication on the fourth plea, that the Defendant did not execute the indenture until long after the enrolment of the above mentioned memorial, to wit, until three months after such enrolment, to wit, on the 30th day of *March* 1822.

And there was a joinder in demurrer on the demurrer to the fifth plea.

The Plaintiff surrejoined to the rejoinder on the replication to the fourth plea, — that during the whole of the said thirty days next after the execution of the said indenture by the Defendant, as in the rejoinder to the replication to the fourth plea mentioned, the memorial described in the replication to the fourth plea was, and remained, and continually thenceforth hitherto hath been and remained, and still is, and remains en-

rolled in the High Court of Chancery, to wit, at *Westminster* aforesaid; as by such memorial now being and remaining so enrolled in the same court fully appears.

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The Defendant demurred to this surrejoinder, and assigned the following causes of demurrer, — that the Plaintiff had not, in or by his surrejoinder, confessed or traversed, or denied the said rejoinder of the Defendant, but had tendered an issue upon a collateral, unissuable, and immaterial point.

Joinder in demurrer.

Laws Serjt., in support of the memorial, argued, that provided the memorial contained a true description of the instrument, it was immaterial when the grantor executed it, and that if the law were otherwise, the greatest inconvenience and delay must be occasioned, where some of several parties to an annuity deed resided in foreign parts. With regard to the witnesses, he maintained on the authority of *Park v. Meers* (a) and *Powell v. Blackett* (b), that it was not necessary the witnesses should see the party execute, and that if they did not see, it was the same thing as if there had been none: *Grellier v. Neale* (c): that it was not alleged in the rejoinder that any were present besides those mentioned in the memorial; and that the Plaintiff had set forth in his replication a memorial which could not be impeached.

Taddy Serjt., *contra*, contended that a memorial *ex vi termini* implied a record of the past, and therefore could not apply to a deed in part executed after the enrolment of the memorial. The memorial must contain the date, and the date is the delivery of the deed, (2 *Salk.* 463.)

(a) 2 B. & P. 217. (b) 1 *Esp.* 97. (c) *Peake N. P. C.* 746.

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which could not effectually take place till the Defendant executed it. Then, with regard to the witnesses, the whole object of the statute requiring publicity of enrolment would be defeated, if those who attested the deed were not those who saw it executed. The witnesses mentioned in the statute must mean those who were actually present.

BEST C. J. I should like to see the granting of annuities by individuals restrained or entirely prohibited. There is but one case in which, in my opinion, it is proper that an annuity should be allowed; namely, where an aged person without dependants is desirous of sinking part of his capital for the purpose of obtaining an improved income for his life. The payment of annuities granted by individuals is generally obtained with so much difficulty, and so often never made at all, that such a purchaser as I have described ought not to think of purchasing an annuity but from government or some public body. I have heard the present Chancellor say from the seat in which I now sit, that the dealing in annuities generally ends in the ruin of all the parties concerned. In the beginning of such transactions, avarice attempts to take a cold-hearted advantage of distress; in the end, distress cheats avarice: all the parties engaged, are actuated by the worst motives, and, as is usual in such cases, all suffer from the conflict.

I cannot however say, that my opinion of the policy of allowing individuals to grant annuities is supported by that of the legislature. The act of the 53 G. 3. c. 141. was rather intended to promote than restrain the granting of such annuities. It relieves the annuitants from the difficulties that 17 G. 3. c. 26. placed them under.

I must construe this act according to the intent of the
the

the legislature, and not according to my own views of the subject to which it refers. The construction that we are desired to put on this statute, would render it impossible for any one to take an annuity granted or secured by a person living at a great distance from *England*. The deeds could not be got back to *England* to be enrolled within thirty days from the time of their execution. Nor could the names of the witnesses, in whose presence such parties executed, be known here before that period had elapsed.

The only mode of complying with the act is to enrol the deeds before they are sent abroad for execution; and to desire the parties who are to execute to have no attesting witnesses. Let us see if the words of the act will allow of such an enrolment. The second section is in these words: "And be it further enacted, that within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge, shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, — of the names of all the parties, and of all the witnesses thereto, — and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, — and of the person or persons by whom the same is to be beneficially received, — the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid — shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require; otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes."

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Whatever may be the literal construction of these words, I think all that the legislature has required by them, was, that the enrolments should not be delayed beyond thirty days from the execution of the deeds. There is no reason why the deeds should not be enrolled before they are executed. It is true that before the execution, the covenantors are not accurately described as parties: for although a covenantee is a party before he executes, a covenantor is only made one by execution. But the enrolment, although made before, only takes effect from the execution; and then the persons whose names are set out in the memorial being parties from that moment, the memorial gives to the grantors all the information that the legislature intended they should have. A writ of error may now be obtained before judgment, and it takes effect from the moment of the entering up of the judgment. With respect to the witnesses, it does not appear on this record that there are any witnesses besides those whose names are set out in the memorial. Probably the Defendant's execution was not attested by any witness. The statute does not require that there should be any attesting witnesses, but only, if there are any, that their names should appear on the memorial. I therefore think that the memorial set out on this record is a sufficient compliance with the 53 G. 3., and that the Plaintiff is entitled to judgment.

Judgment for the Plaintiff.

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THORPE v. GRAHAM.

Nov. 22.

UPON a rule for an attachment against a witness not obeying a *subpœnâ*, which rule this Court discharged, because it did not appear that there had been a sufficient service of the *subpœnâ*; the Court also said, a term having elapsed since the service, that for the future they would adopt the rule in the King's Bench, not to entertain such a motion after a term had elapsed. (a)

(a) See 2 Tidd. 857. — v. Sillery.

RENNELL v. Bishop of LINCOLN.

Nov. 28.

LINCOLNSHIRE to wit.—George Bishop of Lincoln, Thomas Henry Mirehouse, clerk, and William Squire Mirehouse, clerk, were summoned to answer Frances Henrietta Rennell, widow, relict and administratrix of all and singular the goods, chattels, and credits which were of Thomas Rennell, clerk, batchelor in divinity, deceased, at the time of his death, who died intestate, of a plea that they permit the said Frances Henrietta to present a fit person to the rectory of the parish church of Welby, in the county of Lincoln, which is vacant, and in her right as administratrix aforesaid, and whereupon the said Frances Henrietta,

When a rectory falls vacant, the advowson of which belongs to a prebendary in right of his prebend, and the prebendary dies without having presented, the presentation does not belong to his personal representative.

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by her attorney, complains; for that whereas one *William Dodwell*, clerk, doctor in divinity, late prebendary of the prebend or canonry of *South Grantham*, founded in the cathedral church of *Salisbury*, heretofore, to wit, on the 27th day of *October*, in the year of our Lord 1775, to wit, at *Boston*, in the county of *Lincoln*, was seised of and in the said prebend or canonry, with its appurtenances, — to which said prebend or canonry the advowson of the said rectory of the said parish church of *Welby*, with its appurtenances, then belonged, and still belongs, — in his demesne as fee in right of the said prebend or canonry; and the said *William Dodwell*, doctor in divinity, so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry, with its appurtenances, to which, &c., afterwards, to wit, on the same day and year aforesaid, at *Boston* aforesaid, in the county aforesaid, presented to the said church of *Welby*, being then vacant, one *William Dodwell*, master of arts, his clerk, who, on the said presentation of the said *William Dodwell*, doctor in divinity, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our Sovereign Lord *George* the Third, late King of *Great Britain*; and the said *Frances Henrietta* further says, that the said *William Dodwell*, doctor in divinity, being so seised of the said prebend or canonry, with its appurtenances, to which, &c., in his demesne as of fee, in right of the said prebend or canonry, he, the said *William Dodwell*, doctor in divinity, afterwards, to wit, on the 1st day of *October*, in the year of our Lord 1785, to wit, at *Boston* aforesaid, in the county aforesaid, died so seised; after whose death, to wit, on the 29th day of *October*, in the year last aforesaid, to wit, at *Boston* aforesaid, in the county aforesaid, one *Robert Price*, clerk, was lawfully

admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which, &c.; whereby the said *Robert Price* then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in the right of the said prebend or canonry; and the said *Frances Henrietta* further says, that the said *Robert Price* being so seised of and in the said prebend or canonry, with its appurtenances, to which, &c., in his demesne as of fee in right of the said prebend or canonry, he the said *Robert Price* afterwards, to wit, on the 1st day of *April*, in the year of our Lord 1823, at *Boston* aforesaid, in the county aforesaid, died so seised; after whose death, to wit, on the 23d day of *April*, in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, the said *Thomas Rennell* was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which, &c., whereby the said *Thomas Rennell* then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry; and the said *Thomas Rennell* being so seised, the said church afterwards, to wit, on the 1st day of *June*, in the year of our Lord 1824, at *Boston* aforesaid, in the county aforesaid, became vacant by the death of the said Rev. *William Dodwell*, clerk, the late parson and incumbent thereof, and still is vacant, whereby it then and there belonged to the said *Thomas Rennell* to present a fit person to the said rectory of the said parish church so being vacant as aforesaid; and the said *Frances Henrietta* further saith, that afterwards, and whilst the said church was so vacant as aforesaid, to wit, on the 30th day of *June*, in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, the said

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Thomas Rennell died intestate, so seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, without having presented any person to the said rectory of the said parish church; after whose death, and whilst the said church was so vacant as aforesaid, to wit, on the 22d day of *July*, in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, administration of all and singular the goods, chattels, and credits which were of the said *Thomas Rennell*, deceased, at the time of his death, who died intestate, by the Right Rev. Father in God *Charles*, by Divine Providence, Archbishop of *Canterbury*, Primate of all *England*, and Metropolitan, was in due form of law, granted to the said *Frances Henrietta*, whereupon and whereby it then and there belonged, and now belongs, to the said *Frances Henrietta*, as administratrix aforesaid, to present a fit person to the said rectory of the said parish church so being vacant as aforesaid, and which is still vacant; but the said Bishop of *Lincoln*, and the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* unjustly hinder her from presenting a fit person to the said rectory of the said parish church, whereupon the said *Frances Henrietta*, administratrix as aforesaid, saith, that she is injured, and hath sustained damage to the value of 1000*l.*, and, therefore, she brings her suit, &c. And the said *Frances Henrietta* brings into Court here the letters of administration of the said Archbishop, which give sufficient evidence to the Court here of the grant of administration to the said *Frances Henrietta* as aforesaid, the date whereof is a certain day and year, to wit, the day and year above in that behalf mentioned, &c.

Plea. And the said Defendant, *George* Bishop of *Lincoln*, by *William Gillmore Batton* his attorney, comes

comes and defends the wrong and injury when, &c., and saith that the said rectory of the parish church of *Welby* is within his diocese, and that he hath nothing, nor doth he claim to have any thing in the said rectory of the church aforesaid, or in the advowson of the same, except only the admission, institution, and induction of the parson to the rectory and parish church, and all such other things as belong to the ordinary as ordinary of that place: and this he is ready to verify, wherefore he prays judgment, if the said *Frances Henrietta* without assigning some special disturbance in the person of him the said Bishop ought to have or maintain her said action against him, &c.

And the said Defendant *Thomas Henry Mirehouse*, clerk, and *William Squire Mirehouse*, clerk, by their attorney, come and defend the wrong and injury, when, &c. and say that the said *Frances Henrietta* ought not to have or maintain her action against them, because they say, that after the said *Thomas Rennell* had so died without having presented any person to the said rectory of the said parish church, and whilst the said church was so vacant as aforesaid, to wit, on the 19th day of *July* in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, he the said Defendant *Thomas Henry Mirehouse*, clerk, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which said prebend or canonry the said advowson with its appurtenances then belonged and still belongs, whereby he the said *Thomas Henry Mirehouse* then and there became and was seised of and in the said prebend or canonry with its appurtenances, to which, &c., in his demesne as of fee in right of the said prebend or canonry, and whereby it then and there belonged to him to present a fit person to the said rectory, so being vacant

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as aforesaid; and the said *Thomas Henry Mirehouse*, and the said *William Squire Mirehouse* further say, that he the said *Thomas Henry Mirehouse* being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry with its appurtenances, to which, &c., afterwards, to wit, on the 26th day of *September* in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, presented to the said church of *Welby*, being then vacant, the said Defendant *William Squire Mirehouse*, his clerk, for the purpose of his being admitted, instituted, and inducted into the same, but which said admission, institution, and induction have been hindered and prevented by his majesty's writ of *ne admittas* to the said Defendant Lord Bishop of *Lincoln*, in that behalf directed; for which reason the said *Thomas Henry Mirehouse* hath prevented the said *Frances Henrietta* from presenting a fit person to the said church; and this they the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* are ready to verify; wherefore they pray judgment if the said *Frances Henrietta* ought to have or maintain her aforesaid action thereof against them, &c., and they also thereupon pray a writ to the said bishop, &c. And the said *Frances Henrietta*, as to the plea of the said bishop, (inasmuch as he hath not nor claimeth to have any thing in the church aforesaid, or in the advowson of the same, except only the admission, institution, and induction of the rectors to the same rectory and parish church, and all such other things as belong to the ordinary as ordinary of that place,) prays judgment against the said bishop, and a writ to the said bishop, &c. Therefore it is considered that the said *Frances Henrietta* recover against the said bishop her presentation to the said church, and that she have a writ to the said bishop, that notwithstanding his disclaimer he admit a fit person to the said church on the presentation of the said *Frances Henrietta*, and the said

said bishop is not amerced because he hath excused himself of any particular disturbance, but let execution thereof be stayed until the said plea between the said *Frances Henrietta* and the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* be determined, &c. And the said *Frances Henrietta* as to the plea of the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* by them above pleaded says, that the said plea and the matters and things therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude her the said *Frances Henrietta* from having and maintaining her aforesaid action thereof against them the said *Thomas Henry Mirehouse* and *William Squire Mirehouse*, and that she the said *Frances Henrietta* is not bound by the law of the land to answer the same; wherefore for want of a sufficient plea in this behalf, the said *Frances Henrietta* prays judgment and her damages by reason of the hindrance aforesaid, together with a writ to the said bishop to be adjudged to her, &c.

This case was argued twice. First, in *Hilary* term 1825, by *Wilde* Serjt. for the Plaintiff, and *Taddy* Serjt. for the Defendant: and again in *Trinity* term, by *Vaughan* Serjt. for the Plaintiff, *D'Oyly* Serjt. for the Defendant, and *Bosanquet* Serjt. for the crown. There was a difference of opinion among the members of the Court, and they delivered their several judgments at such length as to render superfluous, especially in a case of so rare occurrence, a detailed report of the arguments of counsel.

On the part of the Plaintiff it was contended, that where a church falls vacant, the next presentation is a chattel interest, and, as such, must be disposed of according to the unvarying rule of law by which all such interests are regulated.

That the character or situation of the party, into whose

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whose hands a chattel falls, cannot alter the nature of the interest, or the common law mode of disposing of it.

That such an interest cannot be in abeyance, or go in succession, but must, for the foregoing reasons, belong to that party in whose time the vacancy takes place, or his personal representative; and that this was admitted to be the law with respect to archbishops' options, which could not be distinguished from any other spiritual chattel.

For the Defendants it was argued that the incidents of ecclesiastical patronage in spiritual hands were different from the incidents of the same patronage in lay hands, the lay patron having an interest both of profit and of trust, the spiritual patron only a trust; and a trust to be exercised for the benefit of the public:

That in the pleadings the Plaintiff's intestate was alleged to be seised in right of his prebend, and the presentation, therefore, ought to be in the same right; yet it was impossible for the administratrix to present in right of the prebend. Again, a lay patron might grant an advowson, or next presentation, but there was no instance of a spiritual patron having exercised such a power. The temporalities of a bishop were also mentioned as a proof that the incidents of a chattel in trust might depend in some degree upon the character of the owner. If a bishop have an advowson, and the church become void, and the bishop die, neither his executors nor successor shall present, but the king.

On the part of the crown, the case was likened to that of the temporalities of bishops, priors, and abbots, the practice with regard to which it was contended ought to be pursued in the present instance.

Civ. adv. vult.

GASELEE J. This is a *quare impedit* brought by the administratrix of the late prebendary of *South Grantham*

in the cathedral church of *Salisbury*, against the three Defendants, to recover the presentation to the rectory of the parish church of *Welby* in the county and diocese of *Lincoln*, the advowson of which belongs to the prebend of *South Grantham*, and which became vacant in the lifetime of the intestate, the late prebendary.

The declaration states the seizin of one *William Dodwell* of the prebend, to which the advowson belongs in his demesne as of fee in right of the said prebend; his presentation of a clerk who was admitted, instituted, and inducted; the death of the prebendary, and the admission, institution, and induction of *Robert Price* to the prebend; the death of *Price*, and the admission, institution, and induction of the intestate; the death of the incumbent, whereby it belonged to the intestate to present; the death of the intestate pending the vacancy, and administration granted to the Plaintiff, whereby she is entitled to present, but that the Defendants hinder her.

The Defendant the bishop pleads the usual plea, that he claims nothing but as ordinary, and there is judgment against him with a stay of execution in the usual form.

The other Defendants plead that after the death of the intestate, and while the church continued vacant, one of them was duly admitted, instituted, and inducted, to the prebend, whereby it belonged to him to present to the rectory; that he accordingly presented the other, whose admittance has been prevented by a writ of *ne admittas* directed to the bishop.

To this replication the plaintiff has demurred generally, and the Defendants have joined in demurrer.

The case was first argued in *Hilary* term last, when it appearing to the Court, that a question might be made, whether, under the circumstances, the crown was not entitled

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entitled to present to the vacant living, it was directed that this case should be argued a second time, and notice was given to the Attorney-General that he might intervene, if he thought fit, for the interest of the crown. The case was accordingly argued a second time in the last term, not only by the counsel for the respective parties to the record, but also by my brother *Bosanquet* on the part of the crown, and now stands for the judgment of the Court.

The material question which it is necessary for the Court to decide *upon this record* is, whether the Plaintiff has made out her title to present? for if she has not, it is immaterial as to this action, who is entitled, as any decision of the Court upon the title of any other party would not be binding.

The question is a new one, for notwithstanding all the industry which has been exerted by the several counsel by whom the case has been argued, and by those by whom it is to be decided, no case similar to it has been found in the books; and although one would think that the case must have happened in many instances, none have been discovered.

In support of the affirmative of the question, the Plaintiff must make out that the right of presentation to a presentative living, the patron of which is intitled to the advowson in right of an ecclesiastical preferment, and the vacancy in which happens in the life-time of the patron, is a chattel severed from the inheritance, and in the event of the death of the patron before the vacancy is filled up, belongs to his personal representative in the same manner as it would have done, had he been seized of the advowson in respect of any temporal property.

I use the term presentative living, because it has been decided in this Court in the case of *Repington v. The Governors of Tamworth School*, in 2 *Wils.* 150, after two arguments, that in the case of a donative, the right

of

of donation descends to the heir, and that the executor has no title, which he would have had, had it been a presentative benefice.

I could have much wished for a fuller report of that case than is to be found in the very short statement of it in *Wilson*, in which neither the argument of counsel, nor the grounds of the decision are mentioned; nor do I find any other authority upon the point.

I have seen the declaration, which stated that one *Sebright* was seized of the advowson and donation of the vicarage, as of fee and right, which said vicarage had been immemorially a donative; and a prescription in *Sebright*, and all those whose estate, &c., upon a vacancy to give such vicarage to such person as they should think proper, to be held during his life.

It then deduced the title to the Plaintiff's testator, shewing the vacancy to have happened in his lifetime, and to have continued to, and at his death, whereby it belonged to Plaintiff to present. I do not find what the plea was, but whatever it was, the argument appears to have been in arrest of judgment.

It seems that originally the right of presentation to all churches was in the bishops, and perhaps it is not easy to ascertain precisely at what period any alteration happened in that respect. It appears, however, to have taken place at a very considerable time back, and the origin of it is thus accounted for by *Lord Coke*.

“ The right of advowsons, or of presenting a clerk to
 “ the bishop as often as a church becomes vacant, was
 “ first gained by such as were founders, benefactors, or
 “ maintainers of the church, either by reason of the
 “ foundation, as where the ancestor was founder of the
 “ church; or by donation, where he endowed the
 “ church; or by reason of the ground, as where he gave
 “ the soil whereupon the church was built:” 1 *Inst.* 119.

And

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And *Gibson* says, "although the nomination of fit persons to officiate throughout the diocese was originally in the bishop, and *no other*, yet when lords of manors were willing to build churches, and to endow them with manse and glebe for the accommodation of fixed and resident ministers, the bishops, on their parts for the encouragement of such pious undertakings, were content to let these lords have the nomination of parsons to the churches so built and endowed by them, with reservation to themselves of an entire right to judge of the fitness of the parsons so nominated; and what was the practice, became in process of time the law of the church." *Gibson*, 2nd Ed. 7. 57.

The general rule is admitted, that if one be seized of an advowson in fee, and the church becomes void, the void turn is a chattel, and if the patron die before he presents, the avoidance doth not go to his heir, but to his executor. And to such an extent is the doctrine of the void turn being considered as a chattel and severed from the inheritance, carried, that it is held, that where a wife is seized of the advowson, and the church being void, dies without having had issue, so that the husband is not tenant by the curtesy, still the husband shall present to the void turn: 21 H. 6. 56 b.

And where the husband is tenant by the curtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir shall not have the turn, but the husband's executors. And so is the law in most cases where the interest determines after the church is void, and before presentment. *per Finch*. 38 E. 3. 36. *Bro. Presentation al Eglise*, 18. 21 H. 6. 56.

Other authorities in which the void turn is stated to be a chattel, are, — *Fitz. Nat. B.* 34. n. "If a vicarage happen void and before the parson presents, he is
 " made

“made a bishop, &c.; yet he shall present to this vicarage because it is a *chattel vested*.” 4 *Leon.* 109.
 “this interest is a *chattel*, for if the church void, and before presentment the patron dieth, his executors shall have the presentation, for that it was a *chattel vested* in their testator.”

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It is said, there are some exceptions to the general rule of the executor being entitled to present. One is, where the patron is also the incumbent. As in the case of *Hall v. The Bishop of Winton*, 3 *Lev.* 47., where the same person being parson of the church and seized in fee of the advowson, although it was objected that the advowson did not descend to the heir until after the death of the ancestor, and by the death of the ancestor the church was void, and the avoidance, by that, severed and vested in the executor, the Court on the first argument held and adjudged that the heir should have it; “for all is done in an instant; the descent to the heir and the falling of the avoidance to the executor; and where two titles accrue in the same instant, the elder shall be preferred; as in the case of joint tenancy where one devises his part, the title of the devisee and of the survivor happen in the same instant, and the title of the survivor being the elder, shall be preferred.”

Another is, where the patron is a bishop and entitled to the living in right of his see. There if the bishop dies after the vacancy and before it is filled up, the king and not the executors shall present. And this is urged by the counsel for the Defendant, if not as an authority in favour of the new prebendary, yet against the right of the Plaintiff, which will equally answer their purpose in this action. Various reasons are assigned in the books for this. In *Co. Lit.* 388 a. it is said, “that if a church become void in the life of a bishop, and so remain until after his decease, the king shall
 “ present

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“ present thereto and not the executors, for nothing
“ can be taken for the presentment, and therefore it is
“ not assets.”

This, however, cannot be the reason, for if it were, it would apply to every case, even the admitted one of a lay patron, in which, therefore, it might be said, the executor is not entitled to the presentation: for nothing can be taken for it, consequently, it is worth nothing: and therefore no assets. The dicta respecting value are, however, contradictory: *Hob.* 304. Advowson may be yielded in value upon a voucher, and may be assets in the hands of an executor. In 39 *H.* 6. the king granted the monks should have all their possessions of the abbey in the vacation for their sustentation: ruled, that they should not have the advowsons, because no sustentation arose out of them.

It has also been argued, that the presentation is a spiritual trust, and consequently on the vacancy of the see vested in the king as the supreme patron and head of the church. If this were so, would not the guardian of the spiritualities of the vacant see be the proper person to present, or if the see should be filled up before the presentation, would not the new bishop be entitled to it? But on the contrary, the authorities shew that it is considered as part of the temporalities; that the king takes it as such; that it passes to a third person by a grant of the temporalities; and that, although the church remains void, not only until after consecration of the new bishop, but after the restitution of the temporalities of the see, the vacancy is still to be supplied by the king or his grantee, and not by the new bishop. Surely nothing can be more conclusive to shew it to be a temporal chattel, and completely severed from the advowson. There is a passage in *Watson, chap. 9. p. 48.*, in the edition of 1701, which shews very clearly the rights of the crown on this subject.

It

It is thus: " But in the case of a bishop, the void
 " turn of a church, of the advowson whereof he is seized
 " in right of his bishopric, by his death doth not go to
 " his executor. But when the temporalities of the
 " bishopric are seized into the king's hand, the king
 " doth not only present such benefices as became void
 " during the seizure, (18 Ed. 3. 5 a., 29 a., 30 a. 24 Ed. 3,
 " 26. 5 E. 2. *Fitz. quare Impedit*, 165. 19. E 2. *quare*
 " *Impedit*, 178.,) and as were void after the death of the
 " bishop and before the seizure, (12 E. 3. *Fitz. quare*
 " *Impedit*, 56., but also of all such as were void when
 " the bishop died; (50 Ed. 3. 9 H. 6. 16 b. *admitt*;
 " 24 Ed. 3. 26. *Lib. Parl.* 21 Ed. 1. *Prior de Bermond-*
 " *sey's case*, 24 Ed. 3. 30. 1 *Inst.* 90. 388 e.;) yea, and
 " to such to which the bishop had at any time presented
 " or collated, if his clerks had not taken as well in-
 " duction as institution, or collation before the bishop's
 " death, because nothing but induction fills the church
 " as against the king; (*Liber Parliamentorum*, 21 Ed. 1.
 " *The Prior of Bermondsey's case*, 24 Ed. 3. 30. 11 H. 4. 9 e.
 " *Fitz. Nat. br.* 34 k. 36 k. 38 Ed. 3. 3. & 4. *Hob.* 208.;)
 " much more to such to which the bishop had only
 " presented, and to which his clerk was not instituted;
 " (44 Ed. 3. 33.;) and if the bishop doth die the same
 " day after induction, the king is not barred; yea, and
 " whether the king doth of grace grant the temporalities
 " before consecration, or livery of them be sued out of
 " the king's hands by the successor, the king, though he
 " hath not then presented to such benefice, the right of
 " presenting to which came to him by reason thereof,
 " may at any time afterwards present to the same:
 " (18 Ed. 3. 1 e. 24 Ed. 3. 26 b.)"

Fitz. Nat. brev. 33 n. " But if the king have his ad-
 " vovson by reason of the temporalities of a bishop, and
 " during the avoidance the king restore the temporalities

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“ to the bishop, yet he shall present to the advowson,
“ and not the bishop, for this avoidance.”

Fitx. Nat. brev. 93 n. “ If the king grant unto an
“ abbot and his successors, that the monks shall have the
“ temporalties during the vacation, now if the advowson
“ happen to void during the vacation, the monks shall
“ present the same:” (36 *Ed. 3.* 17 *Ed. 3.* 51.)

2 *Roll. Abr.* 945. “ If the king has an advowson by
“ reason of a wardship, and he grants to another during
“ the minority of the ward, and after the church becomes
“ void, and continues so until the ward attains his full
“ age, whereby the interest of the grantee determines,
“ yet the grantee shall have the presentation, and not
“ the king:” (*Contra 29 Ed. 3. 8 b. Admit per Issue.*)

In *Co. Lit.* 17. it is said, on the other hand, that
guardian in socage shall not present to an advowson,
because he can take nothing for it; and by consequence
he cannot account for it; and by the law he can meddle
with nothing that he cannot account for.

In the case of *The Dean and Chapter of Hereford v. the Bishop of Hereford and Ballard*, *Cro. Elix.* 440., the Court held the next avoidance of a church not to be a thing whereof profit could be made, nor any rent reserved.

It is difficult to reconcile this doctrine of advowsons and grants of next avoidances not being worth any thing; with the practice of the present day; for it is quite clear that not only at this day, but for a considerable period, advowsons and grants of next presentations are, and have been matters of merchandize; as, indeed, Bishop *Gibson* admits to be the case, though he complains very much of it, as contrary, not only to the nature of advowsons, which are, he says, merely a trust vested in the hands of patrons, by consent of the bishop, for the good of the church and religion; but also to the express letter of the canon law; the rule of which is that the
right

right of patronage being annexed to the spirituality, cannot be bought or sold.

At what period advowsons and next presentations began to be considered saleable, it is not easy to ascertain, but it seems that presentations were considered valuable in the time of *Ed. 1.*, for in the 19th year of his reign damages are given in *quare impedit* to the amount of two years, or a half year's value of the church, according to the length of time of the disturbance, and to the circumstance of the patron having thereby lost his presentation for that time or not. And before the 12 *Ann.* the practice of selling them was quite common, insomuch that it was thought necessary to restrain it by act of parliament, not generally, but only in the case of the clergy purchasing for their own benefit. Dr. *Burn* says, "This act being only restrictive upon clergymen, all other persons continue to purchase next avoidances as they did before, and present thereto as they think proper." Another observation is, that the act only attaches if the purchaser is himself presented.

It is said that in case of a lay patronage, the church is secure from an improper person being presented, by the bishop's right to refuse the party presented.

The same protection is afforded in this case; the administratrix here only claims to present. The Bishop of *Lincoln* is to judge of the fitness of the person presented. So it is in all cases of ecclesiastical patronage, except in the case of a bishop collating to preferment within his own diocese. It is so with the options of an archbishop: with respect to which, it is to be observed, that they are to all purposes considered as chattels, and his personal property. He may devise them by his will; and if he does not devise them, they pass to his executor or administrator. They are not considered as belonging to the see, and seizable by the

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king, amongst the other temporalities belonging to it. The case of options, also, is an answer to a distinction which has been attempted to be made between ecclesiastical and lay patronage, that the former is never sold or even granted away, or disposed of, until the avoidance actually happens. For the subject of the option is granted the very instant of the bishop's appointment to the see; and although it is not to be supposed that the archbishop would make it an object of sale, yet if it should happen that he should die intestate, and a creditor take out administration, what is there to restrain the administrator from selling the options before the vacancies happen; or, indeed, in a common case, to prevent a residuary legatee, or one of the next of kin, from calling upon the executor or administrator to do so? This inconvenience cannot arise here, for the vacancy having happened, the void term cannot be sold.

I mention the case of options to shew that amongst the highest dignitaries of the church, there does not appear to be any apprehension of danger in permitting a presentation to fall into the hands of an executor. I do not mention it as a case which has hitherto received any express judicial sanction. It is certainly not conformable to the ancient custom, as set out in the grant of an option, in the Appendix to 2 *Gibson*, 1329, where it is stated to have been the ancient and immemorial usage for the archbishop to name a fit clerk, for whom the new bishop was to provide *quam primum facultas se obtulerit*,—as soon as he could,—and to assign him a pension in the meantime.

Cranmer appears to have been the first who adopted the present course. That the law has no apprehension of any danger from the presentation falling into the hands of an executor, is clear from the daily sanction it gives to the grants of next presentation,—in all which, if the grantee dies before the church avoids, the presentation

ation falls to the executor or administrator, — and by the allowing an executor or administrator to maintain a *quare impedit* in his own name.

In one of the cases I have met with, the name of which I do not remember, if my recollection is accurate, a question was made whether the executor could complain of the disturbance in the testator's time as well as his own, which was determined in the affirmative.

I am not aware of any instance, in modern times at least, of any ecclesiastical patron having sold the next presentation of any living to which he was entitled in respect of his ecclesiastical preferment. In addition to the improbability of their doing so, the uncertainty of the grant's taking effect by the vacancy happening in the life-time of the grantor, would, of course, render it not frequent. But were it to be done, and the avoidance happen in his life-time, I am not aware of any authority which has said he would not be bound by his own grant, although he cannot bind his successor. On the contrary it is stated, (*Watson* page 53,) that the grant by a bishop of the advowson of an archdeaconry for twenty-one years, though void against his successors, and the king, is good against himself, so that he cannot void it during the time he continues bishop; so also grants by deans and chapters become void when the dean dies, but bind both dean and chapter during the life of the dean. For this he cites 3 Co. 60. *Richman v. Garth*, 2 Cro. 178.

That such grants have been made in earlier times, appears from many precedents to be found in the book of entries.

Vet. Int. 110. *The King v. The Abbott of* . . . and another. The declaration states the seizin of a former abbot of the vicarage of the church of K., who presented T.: the death of that abbot, and the election of a successor: the abbot and convent granted the next presentation to T. B. A writ against T. B., who was

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outlawed. The death of the incumbent during the outlawry, whereby it belonged to the king to present.

Winch. 825. Stanhope v. Bishop of London, Williams and Anderson, reported in Hob. 237. The declaration states, that the prior of *Thetford* was seized of the moiety of the advowson of the church of *Kippingell*, and one *Sir John Denham* of the other moiety, to present by turns: that the church being full of one *Brirelly*, the prior, with consent, &c., did grant the next avoidance unto *Bryan Higden*: the dissolution of monasteries, &c., and grant of priory and the moiety of the advowson by *Hen. 8.* to *Sir Michael Stanhope* and wife, and heirs male of his body: the death of the incumbent, and presentation by grantee of next avoidance: upon the death of the second incumbent, the party claiming under *Denham* presented, and upon the next vacancy Plaintiff, as heir male of *Sir M. Stanhope*, presented, and Defendants disturbed.

Co. Ent. 507. Webster v. Archbishop of York and Woodroffe. Archbishop seized of prebend of *Stillington* in cathedral church of *St. Peter*, collated *Basal*: archbishop deprived: temporalties came to the queen: incumbent deprived: queen presented *Atkinson*: *Young* became archbishop, and in *First Mary* granted to *George Webster* and *John* his son, the first and next presentation to the prebend: confirmed by dean and chapter: death of *Atkinson*: belongs to Plaintiff to present: *imparlance*.

Co. Ent. 508. Hill v. Bishop of London and others. Prior of *Shene*, seized and presented: *29 H. 8.*, granted next presentation to *Arthur*.

Rastall 522. Bishop of *Bath and Wells* seized of prebend: collated: bishop granted next presentation to Plaintiff: bishop pleads he does not hinder; and because he does not deny the grant, judgment, with stay of execution. *Venire* to try issue.

2 *Brown* 233. *Adamson v. Bishop of Lincoln and others*. Prior seized: presented: grant of next presentation: vacancy: grantee presented: grant of next presentation: assigned over: grant of second presentation to another: lease for ninety-nine years: vacancy: assignee presented: vacancy: second grantee presented: death of lessee: vacancy: executor presented: death of executor: his widow, being his executrix, married: vacancy: husband presented: wife assigned: assignee granted next presentation to Plaintiff: vacancy: Defendant hinders: bishop demurs: clerk pleads much at length and traverses the vacancy as alleged: demurrer to that plea.

Overton v. Syddal. Co. Ent. 122. Debt on lease. *Henry Syddal*, prebendary of the prebend of *Terwyn* in cathedral church of *Lichfield*, demised to *Henry Syddal* all the prebend, with lands, except *donations vicarie apud T. ac nominatione et presentatione vicarie choralis in cathedrali*: confirmed by bishop and dean and chapter: action by successor for rent. Plea, assignment.

Winch. 853. *Byng v. Bishop of Lincoln. Connam* prebendary of *Grantham*, seized of the advowson of *D.* presented *Bally*: *Connam* died: *Still* made prebendary: 6th July, Jac. 1., grant of next presentation to *Cotton*: assignment to Plaintiff: death of *Bally*: Defendants hindered Plaintiff. Plea; before *Connam*, *Jacob Proctor*, prebendary: presented *Whitehead*, and granted next presentation to *Powell* and *Blacher*: confirmed by bishop, and dean and chapter: death of *Powell*: *Blacher* died, leaving his son executor: assignment by executor to *Richard Halsey*: death of *Proctor*: *Connam*, prebendary: death of *Whitehead*: *Connam* presented *Bally*: *Richard Halsey* died: *John*, his executor: death of *Bally*: *John Halsey* presented *Primett*. Demurrer.

These cases shew clearly the fact that such grants have been made by bishops, abbots, priors, and pre-

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bendaries, although there does not appear to have been any express decisions upon them; yet, as said by *Ashhurst J.* in *2 Term Reports*, 636, forms of legal proceedings are evidence of what the law is.

But the case of *London v. Southwell*, (reported in *Hob.* 304., and the pleadings of which are in *Winck's Entries*, 810.,) where the prebendary of *Normanton*, who in right of his prebend, was seised of the advowson of a vicarage, demised divers parts of the prebend with all commodities, emoluments, profits, and advantages with the appurtenances to the said prebend appertaining, or in any manner belonging, was discussed, and the Court decided that the advowson did not pass by the lease. Why? not because the grant of the advowson by a spiritual person was illegal, but because the words were not sufficient to pass it. The Court said the words are four, commodities, emoluments, profits, and advantages to the prebend belonging, all which four words are of one sense and nature, implying things gainful, which is contrary to the nature of an advowson regularly. Yet an advowson may be yielded in value upon a *voucher*, and may be assets in the hands of an executor.

Surely if the grant of an advowson by a spiritual person had been wholly void, that would have been a shorter mode of deciding the case. The exception in the case of *Overton v. Syddall*, which is referred to in some of the cases, may afford an inference that but for the exception it would have passed.

In the case cited from the old book of entries, it appears the king claimed the presentation on account of the outlawry of the grantee. There is another case of a similar nature, but stronger, inasmuch as it shews the next presentation to be so much a chattel, as to pass under a grant of the goods and chattels of felons, persons outlawed, &c. The case is *Holland v. The Bishop of Chester, Shelly and Gibson*: reported in *Hob.* 302., and the

the pleadings in *Winch 692*. *Edward 4.* granted to *Mowbray*, Duke of *Norfolk*, the goods and chattels of felons outlawed, &c. in the *Rape of Bramber*: title brought down to the Plaintiff: Sir *John Shelly* seised of the advowson, grants next avoidance to *Thomas Shirley*, who was outlawed for debt; church void, and so belongs to Plaintiff to present.

The case turned upon the question, whether the goods and chattels of persons outlawed for any thing except felony, passed: the Court held that they did.

It has been already admitted, that if the right of presentation on this occasion is not in the Plaintiff, it is not material what other person has the right; but in determining whether the Plaintiff is entitled, it may be of use to endeavour to ascertain if there be any other person to whom the Court can see clearly that the right of presentation belongs.

At present the claims of two persons only have been put forward, viz. of the new prebendary and the king. In favour of the first of these, I can find no authority either direct or by analogy. If the void turn is a chattel, the authorities are clear that the successor of a sole corporation cannot take a chattel by succession. And it is as a sole corporation only, that the prebendary appears upon this record.

The claim of the latter I have already stated to be in my judgment insupportable.

But supposing the Plaintiff not to have the right, it may, perhaps, be contended that the patron of the prebend is entitled; and there is an authority which, if rightly stated in *Rolle's Abridgment*, might have afforded some colour for such a claim. In *2 Roll. Ab. 346*. it is said, if the parson ought to present to a vicarage, yet if the vicarage became void during the vacancy of the parsonage, the patron of the parsonage shall present. But upon referring to the authority cited in

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Rolle, M. 19 E. 2. quare impedit. 178., it appears the claim by the crown is on the ground of this vacancy happening during the seizure of the temporalities of the priory. In the present case, indeed, if such claim were valid, we should probably have heard it made by the learned counsel who argued for the crown; for in the event which has happened since the church has been vacant, the Crown might set up another title, as part of the temporalities of the Bishop of *Salisbury*, who, according to the general law in 3 *Rep.* 75. is patron of the prebend, though to that I believe there are some exceptions.

Another claimant may, by possibility, be found in the person of the first Defendant upon the record; the Bishop of *Lincoln*; who, although upon this occasion, he has claimed as ordinary only, which he may have done, considering the Plaintiff entitled, may, if the Plaintiff's claim is overruled, contend that under the circumstances the presentation in this instance ought to revert to its original channel, and be made by the bishop of the diocese; or, to use the proper ecclesiastical phrase, he ought to be collated to it.

Are we prepared to decide in favour of any of these claims? Upon the whole, therefore, there being no authority to take this case out of the general practice with respect to presentative livings; and it appearing that, in fact, grants of next presentations of ecclesiastical patronage, have been made and acted upon by the executors of the grantees, I think the safest course is to decide according to that practice; and, therefore, upon the best judgment I can form upon this record, I am of opinion that the administratrix of the deceased prebendary is entitled to present, and, consequently, that there must be judgment for the Plaintiff.

I very sincerely lament that I feel myself compelled to come to this opinion, not only because I have the misfortune to differ from the rest of the Court, in which

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case my opinion is always to be distrusted, but also because advertng to the original institution of prebendal churches which is treated of at some length in 1 *Burn's Ecc. Law*, title *Appropriation*, it is not impossible, but that upon looking to the original foundation of the cathedral church of *Salisbury*, which as matter of history may be stated to have been before the time of legal memory, and the various statutes made from time to time by the members of this cathedral, matter may be found which might have warranted a different judgment from that which upon the present frame of the record I have felt myself called upon to pronounce.

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BURROUGH J. It frequently happens that different persons come to different conclusions from the same premises; this is the case with me in drawing a different conclusion from that of my Brother *Gaselee*. I am of opinion that judgment must be given for the Defendants, *Thomas Henry Mirehouse* and *William Squire Mirehouse*.

I ground myself on the allegations in the declaration, that the *late prebendary*, in his life-time and at his death, was seised of the prebend or canonry founded in the cathedral church of *Sarum*, with its appurtenances, to which the advowson of the rectory in question is annexed, in his demesne, as of fee and right, *in right of the said prebend or canonry*. These are the premises on which I ground my opinion.

These allegations stand admitted on the record. This naturally leads to an investigation of the character, in law, of the prebendary or canon; of the nature of his prebend, or in other words, of his right as prebendary or canon; and of what must be taken to be meant by the seisin in his demesne as of fee, in right of his prebend or canonry.

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By our known law a prebendary or canon is an ecclesiastical sole corporation: as such, he can have no heir, he can have no personal representative: as such his prebendal rights or property cannot go, either to his natural heir or his personal representative. Where must those things go? to his successor. In their corporate capacities, in estimation of law, the predecessor and successor, being one, it is a continuance of the same corporate body. This is more visible in an aggregate corporation: when one of the body dies the body corporate remains. A prebendary or canon is a corporator, in two respects: in one respect, as member of the corporation of dean and canons. He is one of chapter, having *sedem in ecclesiâ et vocem in capitulo*: he is a corporator sole, as prebendary. In every relation in which he stands to the church he is a corporator.

That I might thoroughly understand the question we have to decide, I have looked into the origin of the rights of this particular prebend or canonry. Before the removal of the church of *Salisbury* to the place where it now stands, *Osmond*, Bishop of *Salisbury*, nephew of *William* the Conqueror, by his charter, granted to the church of *Salisbury*, for ever (amongst other things) the church of *Grantham*, with the tithes and other things there adjoining.

Whilst in this state, the church of *Salisbury*, and that church only, could have the duties of the church of *Grantham* under its care. A copy of this charter is to be found in the evidence book at the church of *Salisbury*, in the registry of that church, and in 3 *Dugdale Mon. Angl.* 371.

It must have been the intention of the founder that this property should be in the disposition of the church only.

In process of time the property so given by *Osmona*

was appropriated in different ways. New prebends were founded in the church, and this and other property apportioned to them and other members of the church. Whether to the bishop, to the dean, to the dean and chapter, or to the prebendaries or canons, is wholly immaterial; they were all corporations of different descriptions, and could only take and hold in their corporate capacities. These corporate capacities excluded the idea of any of the rights going otherwise than in succession.

Therefore I presume it is, that we find no instance of an heir or personal representative of a sole corporation presenting or claiming to present to any church, to which the right of presentation had vested in the corporate character.

If one adverts to a lay advowson in fee, appendant or in gross, a manifest distinction is to be perceived; the party claiming a right to present would allege a seisin in demesne as of fee, or in gross as of fee and right.

What is the legal explanation of the word fee in such cases? It is to him and his heirs. The property is in him in his natural character; the party seised of it may dispose of it as he pleases; if he dies without doing so it goes to his heir. If a vacancy happens in the ancestor's time, and he dies without disposing of it, it is wholly immaterial, in my mode of considering the question, whether it belongs to the heir, or to the executor or administrator to present.

There is no qualification of the seisin in such case.

But the prebendary of the prebend of *Grantham* (as appears in the declaration) is seised in his demesne as of fee, in right of his prebend or canonry. It is said, "in his demesne as of fee." By this it cannot be intended to mean a seisin to him and his heirs; the heir

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can in no case have it; it must mean to him and his successors.

There being so plain a distinction between the case of an ordinary lay patron seised of a lay advowson, and a prebendary seised in his corporate capacity in right of his prebend, it appears that no case of a lay patronage applies to the subject in question; such a case can only apply by way of analogy; on examination it is clear the analogy does not hold, and, therefore, it has no application to this subject.

By looking to the fountain head, to the original grant to the church of *Sarum*, and then tracing the creation of the prebendary with the prebend appropriated, and the annexation of the advowson to the prebend, I feel myself obliged to say that the right to present in the present instance has not been disunited from the prebend.

The only case that bears materially on the subject, is *Repington v. The Governors of the Free School of Tamworth*, 2 *Wils.* 150. I have a copy of the declaration in my possession. It is there stated, that *Sebright Repington, Esq.*, was seised of the advowson and donation of the vicarage of *Tamworth* as of fee and right. The title to the advowson is then derived to *E. Repington* as tenant in tail male. It is then stated that a vacancy happened, that *E. Repington* died without having given it, and his executor claimed to give it. There were pleas and a verdict for the Plaintiff. This Court arrested the judgment, saying, that the right belonged to the heir, and not to the Plaintiff, the executor.

The Court said, the executor would have had a title, if it had been a presentative benefice. The declaration is, I admit, a confirmation of the law as it is said to exist, and as it respects lay property. But it is also a confirmation of what I hold to be the law in the present case. You must look back to the origin of the present right,

right, and see what it is. If the founder has placed it in a state to be enjoyed only in one particular form, that must be adhered to. In the present case, I think the right is annexed to the prebend, and one who is not clothed with the character of prebendary cannot exercise it. The Plaintiff claims as the executrix of a natural person. She does not connect herself with the prebendary in his corporate capacity to the exclusion of the successor, and, therefore, there must be judgment for the Defendants.

PARK J. I am of the same opinion (as I indeed always have been since I heard the argument) with my brother *Burrough*, that judgment must be for the Defendants.

In this case, as my brother *Gaselee* has said, it is not absolutely necessary to decide who has the right of presentation to the living in question, though upon that I have a clear opinion, as will appear by the result. The point is, has the Plaintiff established her claim, as administratrix to the late prebendary of *South Grantham*, in the cathedral church of *Sarus*? I am of opinion she has not.

One thing has been much pressed at the bar, which I think wholly unnecessary, because upon that we are, as I at present believe, all agreed; namely, that in the case of *lay* patronage, in the events which have happened, the executor or administratrix would have been entitled to this presentation, and not the heir; because in *lay* patronage the church having become vacant in the life-time of the last possessor, the presentation became a chattel, went to the executor as personal property, and did not any longer remain with the advowson as a part of the possessions of the heir of the person seized of the advowson; and in that case it is a
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mere question between the representatives of the same patron.

But in my view of this case, that leaves the point still open, and which, as far as my research and reading go, has never yet in specie been decided in the law of *England*.

The real question is, whether lay and spiritual patronage are not to be considered as standing upon a very different footing? And if I should have formed a wrong opinion upon this subject, the silence of our books (and even the diligence excited at the bar having furnished us with no case bearing upon the point) will form no small excuse for those who think the claim of the Plaintiff to be ill-founded. That the fact has existed many hundred of times no man can doubt; and that ecclesiastics, and those who have had to act upon it, must have thought it clear one way or the other cannot be questioned, and, therefore, we find no decision upon it.

How *they* have thought I do not enquire, for we must act for ourselves; though I am induced to say, that till this claim was set up, no one ever imagined that those rights which a man held *merely jure ecclesie* could be exercised by others after he was departed, otherwise one cannot but think such a claim would have been ascertained by some decision in the course of five or six hundred years, the circumstance having necessarily so often happened.

Throughout the whole law of *England* a distinction prevails between the lay and spiritual character: even the cases and statutes just alluded to on the Bench so luminously, by my brother *Gaselee*, prove the distinction.

Personal rights belong to one of these characters, which do not belong to the other.

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The transmission of their property stands under different considerations. A person seised of a freehold right is said to be seised in his demesne as of fee: a clergyman, as in this declaration, is said to be seised in his demesne as of fee, *in right of his said prebend or canonry*. It is very true that many of the evils and absurdities which I contemplate by giving effect to the Plaintiff's claim, will also arise in *lay patronage*; because I must admit that by giving the presentation to the administratrix of a lay patron it may fall to a very inferior person to present, where the administrator may be such; that arises out of the unfortunate situation of *lay patronage*; but which I contend ought not to be carried one single point further.

What was the origin of *lay patronage*? It arose in the infancy of society: it arose from this, that though the nomination of fit persons to officiate throughout the diocese was originally in the bishop, yet when lords of manors of old were willing to build churches, and to endow them with glebes and manses for the accommodation of fixed and resident ministers, the bishops, on their part, for the encouragement of such pious undertakings, were content that those lords should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated; and thus arose that constitution of the church, "*Si quis ecclesiam cum assensu diocessani construxit, ex eo jus patronatus acquiritur;*" and hence followed all the consequences of a mere *lay possession*. Chattels, where chattels, going to the executor; the rights of the heir, to the heir, where by the common law those rights would prevail. But still do those rules apply to the spiritual patron, and can his rights and properties be dealt with as if he were a private person? Of this there is no doubt, that in our

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law, — and I hope they ever will, — lay and spiritual patronage stand upon a very different footing.

The doctrine of the book which has been so often referred to at the bar, I fully adopt, as making a clear distinction between lay and spiritual property. In *Gibson's Codex*, p. 757, it is decisively marked: for he says, “The right or property which the patron has in an advowson will not warrant a plea (as it is in *temporal* property, and of course *Gibson* is speaking of spiritual property,) that he is seised in *dominico suo ut de feodo*, but only *ut de feodo*.” The reason of which is given by Lord Coke (in *1st Institute*, 17. a.), because an inheritance which savoureth not *de domo* cannot serve either for the sustentation of himself or his household; nor can any thing be received of the same for defraying of charges. And in the case of *John London* and the church of *Southwell*, where the words of the lease were, *commodities, emoluments, profits, and advantages* to the prebend belonging, it was adjudged that the advowson did not pass by the said words. Why? because all of them implied things *gainful*, which, as was added, is *contrary to the nature of an advowson, regularly*. *Hob. 304.*

Why is all this? It is because, as I say, an advowson in the hands of a churchman is not a matter of *profit*, but of naked trust merely, and the churchman who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust in *jure ecclesie*, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which only, as a member of the church, could he have a right to dispose. Only as a member of the church of *Salisbury* had Mr. *Rennell* any right; and the moment he expired, all his rights as a member of that church ceased.

Am I right in stating it to be a matter of *trust* only? for upon that much of the argument has turned. Hear bishop *Gibson* again on this subject, in the same pages, 757 and 758.

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“Guardian in *Socage* shall not present to an advowson. Why? because he can take nothing for it, and, by consequence, he cannot account for it, and by the law he can meddle with nothing he cannot account for. Which said doctrine, and the plain tendency thereof, are exactly agreeable, not only to the nature of advowsons, which are merely a *trust*, vested in the hands of the patrons, by consent of the bishop, *for the good of the church and of religion*, but also to the express letter of the canon law, the rule of which is, *jus patronatus cum sit spirituali annexum vendi vel emi non potest*. But the notion and practice of making merchandize of advowsons, and next avoidances, is not so easily reconciled, either to the laws of the church, or to the ancient laws of the land, or to the nature of advowsons, considered (as they certainly ought in reason and good conscience to be considered) in the nature of *mere trusts* for the benefit of men’s souls: Nor does it follow either from the patrons being now vested with that right by the common law, or from its being annexed to a *temporal inheritance*, or ought (legally speaking) to be considered otherwise, than as a *spiritual trust*, since it is certain that the foundation of the right was the consent of the bishop.”

Am I not right then in contending that there is a great difference between lay and spiritual patronage, and that however the exercise of the right in the former case may have so grown up, that it is now difficult, perhaps impossible, to shake it, in the latter it has ever been considered as a *mere trust* to be exercised by the patron for the benefit of the church, for the due discharge of the duties of which he alone is to look, which

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he only can consider in *his life time*, and upon which his executors or administrators may be absolutely unable to form a judgment? It may appear an unfit argument, but I think it a deep one, and of vital importance to the interests of that church which every good man must love and revere, — suppose a prebendary died insolvent, as well as intestate, and that all his next of kin renounced administration, and that his butcher, or baker, or other inferior tradesman, had taken out administration: was this person to present? and yet the consequence must follow. I have admitted that in case of *lay* patronage the same consequence would follow; but I lament it; and I am quite sure, that unless I am compelled by decisive legal authority, I ought not, sitting as a Judge, to carry such lamentable consequences one point further; at least, not to introduce them into the church. That the next presentation (in the event that has happened) could not be assets (in the common and legal acceptance of that word) is quite clear, and, therefore, I cannot conceive that it ought to go to the executor or administrator of the deceased prebendary. It may be a chattel, but in the hands of an ecclesiastic it is a chattel of mere trust.

The total silence of our books during the whole period of our ascertained law of *England*, when the thing must have existed in *fact*, many hundreds of times, is, as I hear said to me, a strong proof that no such idea was ever entertained till *now* upon this question; and I verily believe that no man now living in the church of *England*, and interested in such questions, ever heard before of such a claim.

The Court has been much pressed by the statute of 28 *Hen. 8. ch. 21*. But that statute, upon a full consideration of it, I think has no bearing upon the present question. It appears, at that time, that the heads of the church,

church, following the example of the pope, who, till the Reformation, had exercised a most tyrannical sway over all churches under his dominion, had been desirous of keeping in their hands the temporalities of the church, which belonged to them in their corporate character, whether aggregate or sole, to an unreasonable time for their private benefit: the statute deprived them of that right, and gave the benefits to the incoming possessor from the death of the last incumbent, and to the executors of such successor, if he should die, before he realized those interests; and, therefore, though I was at first taken with that argument as bearing upon the question now at the bar, when it comes to be sifted, it does not appear to me to bear upon the point in the present case. Bishops' grants and several entries have been stated, and cases were quoted in reply from *Cro. Eliz.* upon which I would observe that when they were decided, the church had hardly got into a state of regularity, so soon after the time of the Reformation; and we all know, both from history and law, that till that time the scandalous use made by the popish clergy of their revenues, and the rapacious and grasping manner in which they invaded the rights of the church, was matter of universal complaint. Even in this very reign of Queen *Elizabeth*, and at a later period in it, we find the legislature declaring, that although "by the intent of founders of colleges, churches, collegiate churches, cathedrals, &c. elections, presentations, nominations, &c., should be made of the *fittest and most meet persons* freely, without any reward, gift, or thing given or taken for the same; yet, notwithstanding, it is seen and found by experience, that the said presentations be many times wrought and brought to pass with money, &c., and whereby the fittest persons to be elected, wanting *money or friends*, are seldom, or not at all preferred."

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The legislature of the country, therefore, has sanctioned me in the reprobation I have used as to the shameful venality of the churchmen of that day.

It does not appear from any of the cases in *Cro. Eliz.*, that the bishops took any profits for their grants in these cases. If they did, it was a most disgraceful abuse of their sacred trust; and I do not believe that such cases would be supported if brought into discussion at the present day. But there will be no opportunity for that discussion: for I verily believe, there is not a bishop of the church of *England*, who would not think himself insulted by such a proposition.

The Court has been much pressed also by the options of the archbishops; to which I answer, that they also are anomalies in the law. They were originally, as far as we can trace them, an usurpation in favour of the legatine power, annexed by the Pope to the archbishopric of *Canterbury*, over those who were appointed bishops under him; and that claim, which as *Blackstone* says, was originally an encroachment like most others of the papal see, has been continued to the archbishops in their respective provinces, even after the power of the popes has ceased in this country. But all these anomalies I desire to use in support of my argument, to shew that the rights of *lay* and *ecclesiastical* persons stand upon a totally different foundation; and that the common law of the country as attaching upon property of this description in the hands of a *lay* person, does not attach upon a person who merely holds *Jure Ecclesie*.

We have been also pressed with the case from 2 *Wils.* 150., that of *Repington v. The Governors of Tamworth School*, which has been fully explained by my Brother *Burrough*, to whose argument I refer, as not wishing to trespass longer than is necessary.

The ground of my opinion is, that this, in the case of a *spiritual* patron, is a mere personal trust, to be exercised by him in his spiritual character, which he cannot consistently with his high duty, either devolve upon another during his life, or leave behind him to be exercised by his heir, executor, or administrator after his death. He holds it *jure Ecclesiae*, and in that right only: if he had it not in right of his church, he could not have it at all; and as soon as he dies, all his rights, powers, and privileges, as to the church, absolutely cease, as if he had never existed. This is not a new notion, for Dr. *Burn*, who is now no more, and may be now considered perhaps as an authority, as much as Bishop *Gibson*, and was a very considerable man, shews clearly what was the common understanding of men, and particularly ecclesiastics.

Dr. *Burn* is drawing a distinction between what is to be done with the possessions of a prebendary *after his death*, which he had in common with the rest of the chapter, and what he had in his separate capacity as a sole corporation of himself. (*Burn's Ecclesiastical Law*, vol. ii. p. 92. 7th edition, title *Deans and Chapters* :) "The issues of those possessions, which he hath in common with *the rest of the chapter*, shall after his death be divided amongst the surviving members of the chapter, but the profits of those possessions which he hath in his separate capacity as a *sole corporation* of himself shall be and inure to his successor."

Therefore, if a member of a chapter, as an aggregate corporation, should die after a living had become vacant, as well it might be contended that his executor or administrator might have a voice in the chapter how it was to be filled up, as that such executor or administrator might have it to himself exclusively, where a living belonged to him as a *sole* corporator merely; although

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Dr. Burn, as I think, more justly, says in the one case, it would go to the surviving members of the chapter; in the other, it would be, and inure to the successor. When Gibson says, that advowsons may be granted by deed or will, either for the inheritance, or for the rights of one or more turns, or for as many as shall happen within a time limited, he is speaking of lay patronage only, for he says, "This general rule is to be understood with two limitations, that it extends not to ecclesiastical persons of any kind or degree, who are seized of advowsons in right of their churches; all these being restrained as to bishops by stat. 1 Eliz., and the rest by 13 Eliz., from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and of that sort, advowsons, and next avoidances which are incorporeal, and lie in grant, cannot be. And therefore such grants, however confirmed, are void against the successors: and though they have been adjudged to be good against the grantors, (alluding, no doubt, to the cases from Cro. Eliz., &c. upon which I have already given my opinion,) yet have such grants been generally disused by bishops, and I believe by all other ecclesiastical corporations since the following canon of 1571: *Episcopus prebendarum et beneficiorum suorum, proximas, secundas aut tertias advocaciones, quum vacant, nulli dabit; sunt enim et a bonis moribus, et a Christianâ charitate alienæ.*" In the teeth of this very canon, and within a few years after it was made, we find the two grants made in the cases cited from Cro. Eliz.

It will have been observed, that hitherto I have treated this question upon principle only, upon the distinction uniformly observed in the laws, and by the constitution of England, between the lay and clerical character. They have (and formerly had much larger) exemptions on the one hand; they have disabilities on the other. This distinction between laymen and the clergy

clergy pervades every page of our constitutional history. But I have said, that there is no case in specie to be found applicable to that now in discussion. Those, however, who are at all well versed in the Ecclesiastical history of our venerable church will immediately recognise the justice of those principles which I have been endeavouring to establish.

It is well known, that in the early periods of the church in this country, the *parochia* or parish was the episcopal district. The bishop and his clergy living together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund, for the support of the bishop, and his college of presbyters and deacons; for the repair and ornament of the church; and for other works of piety and charity.

While this state of things continued, in the infancy of society, the stated forms of religion were performed only in these single choirs to which the people of each whole diocese or *parochia* resorted, especially at the more solemn seasons of devotion. But to supply the inconvenience of distant and difficult access, the bishop was wont to send forth some of his presbyters into the remotest parts as a kind of *missionaries*, to be preachers and dispensers of the word and sacraments; and these missionaries returned from their circuits to their homes, that is, to the episcopal college, to give the bishop a due account of their labours and success. But as the wants of society for spiritual instruction increased, and when the members of the episcopal college, or the deans and chapters found it inconvenient themselves to go forth as above mentioned, certain churches were allotted, some by lay patrons, (where they had the patronage given them as a compensation for having built and endowed churches, which, as I before mentioned, was the foundation of lay patronage,) some by the bishops, to the prebendal body at large, some to one particular member
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of the body; or the individual member sent out priests to do the duty, paying them certain sums for doing so, and retaining the remainder to himself, or allowing them to receive the profits, reserving a certain rent to themselves; as may be seen by those who will take the trouble to look into old church records; and thus these churches became *prebendal*, and the supply of the duty was left to the aggregate corporation, if the perpetual advowson was in the whole community of the dean and chapter, or to that sole corporation, or single canon or prebendary who was to have his prebend or exhibition from it.

In process of time these representative curates, who were to account for their profits, and only to receive a small pecuniary stipend for their services, were so ill paid, that the bishops obliged the members of his churches who had such advowsons to retain fit and able *capellans, vicars, or curates* (for these titles all meant the same office) with a competent salary; and this plan failing in its effect, the bishop again interfered, and obliged the clergy (that is the chapters, or the single canon or prebendary, in whom the perpetual advowsons in right of the chapter, or in right of his prebend of which he was seised *jure ecclesie*, was vested,) to make the presentation to perpetual vicars to be endowed and instituted, who should have no other dependance upon their spiritual patron than rectors had upon their lay patrons, with a competent maintenance to be taxed and assigned by the bishop; and this matter became the subject of legislative consideration by the 4 H. 4. c. 12.

In giving this historical detail, I have not thought it necessary to refer to authorities, but what I have said will be found, as the early history of our church, in various books well worthy the attention of the curious, such as *Spelman de non temerandis Ecclesiis*, who says the *proprietores* of the advowsons are still said to be
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parsons of their churches, and are as the incumbents thereof, and by reason of this, their incumbency is full, and not void. See also Bishop *Kennet on Improvements* and *Burn's Ecclesiastical Law*, tit. "*Appropriations.*"

This short history of the church *in general*, I think decidedly proves that what is thus vested in the church for *spiritual* purposes, vests in them as a corporate body, and can never be allowed to fall into the private common stock of the body at large, or of the individual sole spiritual corporator.

What I have said of the church at large, I have no doubt is true of the church of *Salisbury*, and whoever will consult the history of the foundation of that church in 3 *Dugdale*, (as quoted by my brother *Burroughs*), by *Osmond*, Bishop of *Salisbury*, Earl of *Dorset*, and nephew of *William* the Conqueror, will probably find that this history of the foundation of these prebendal presentations in the church at large which I have been giving, is no other than the history of the church of *Salisbury* too.

I am afraid I have fatigued the Court, but as we are not unanimous, I thought it necessary, in a case of research and novelty, to shew that I acted upon a deep conviction I had formed a right opinion. The sum and substance of my opinion then is this: Wherever a person has any thing attached to a spiritual office only, it sinks with the death or resignation of the party who possesses that right.

Thus, then, an ecclesiastical person *during* his incumbency is entitled to all the *profits* which may fall of a chattel nature. But when a living falls vacant to which an ecclesiastical person has, in *right of his church*, a right to present, he can derive no *profit* from it, but merely presents *quasi* incumbent.

The living in the present case may, as I have shewn, be assumed to have been endowed out of the prebend,

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or the advowson of it to have been given or attached to the prebend; in either case the *prebendary* for the *time being*, has the right of presentation, and when the avoidance happens he may present, but he presents in right, and *only in right of his church*; he presents as a *trustee*; the *trust is personal*, it is a trust only, and without profit; and, I contend, cannot be transmitted.

How, then, can the executor or administrator of a deceased ecclesiastic, who dies after avoidance, but before presentation, claim the presentation? Is it that he may make it a chose in action to pay the debts of the testator or intestate? That cannot be, for it is not assets. Does he claim to present because this *trust* had devolved upon, or as it were, become vested in the testator? The trust has indeed devolved upon the testator or intestate, but not in *his own right*; but, as the declaration states, in *right of his prebend*; and the moment he ceased to be prebendary, the trust was no longer in him, nor in his representatives, for it was by bare naked personal trust in him; and the presentation is in him while he is prebendary, but not for his own use or benefit, but for the use and benefit of the church. It is a trust *confided to him*, for the dignity and ornament of the church, that he may appoint a proper incumbent *upon his own personal responsibility*, to have the cure of souls, and for the advancement of the interests of religion; a duty which his executor or administrators cannot in law be deemed qualified to discharge. For these reasons, I think the Defendants are entitled to judgment.

BEST C. J. It appears from the pleadings in this case that the prebendary of *Grantham* is patron of the rectory of *Welby*, and that the incumbent of that rectory died in the life-time of the late prebendary, who died without having presented any clerk to the vacant rectory.

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The Plaintiff is the administratrix of the late prebendary, and the question raised for our decision is, Whether under these circumstances the Plaintiff is entitled to present for this turn to the rectory of *Welby*? I confessed that my mind has fluctuated exceedingly; but I am at length satisfied that the law gives the patronage in this case to the person who, according to sound policy, ought to have it. Great industry has been bestowed on the subject, both by the bench and bar; but neither the judgment of any court, nor the opinion of any writer, to guide us in making our decision, has been found. I have also enquired whether any instances of presentation, made under circumstances like those of the present case, are to be found in the registries of the bishop, but without success.

As neither the records of *Westminster Hall* nor of the church furnish any rule or practice to assist me in coming to a decision, I endeavoured to find other cases from which I could safely reason by analogy to that now to be decided.

In all sciences analogical reasoning must be pursued with great caution. Minute differences in the circumstances of two cases will prevent any argument from being deduced from the one to the other.

I was at first struck with the appearances of similarity between the patronage of tenants for life, and of husbands in right of their wives, and that of dignitaries of the church in right of their churches.

I am, after the most attentive consideration of these cases, now convinced that the resemblance between the last and the two first fails in the very circumstance which, in my judgment, decides to whom the presentation belongs in the present case.

I shall, presently, particularly advert to this circumstance. I would, however, first observe, that in the absence of authority, the only course that can lead us to
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a just and legal conclusion, is to consider the origin of church patronage, and the intent of its founders. If the intent of the founders can be ascertained, it must, if not opposed to some rule of law, or the undoubted policy of the law, govern us in deciding this case.

If he who creates a right has directed by whom and how it shall be enjoyed, those who are to decide any question on that right must consider how he has disposed of it, and follow that disposition.

This is evidently consistent with reason and justice, and is sanctioned by legal authority.

In disputes between members of corporations, the courts of law decide according to the will of the founder, as expressed in the instrument of incorporation, or ascertained by usage.

This principle is distinctly stated by Lord *Kenyon* in *The King v. Bellringer*, 4 *T. Rep.* 822., and by *Buller J.* in *Blankly v. Winstanly*, 3 *T. Rep.* 288. In *Gape v. Handley*, 3 *T. Rep.* 288. *in notis*, this principle is applied by Lord *Mansfield* and the Court of King's Bench to determine whether the right of presentation to a living was in all the members of a corporation or in the mayor and aldermen only. So where two claim under the same grant, the court which has to decide on their claims must be governed in its decision by the intent of the grantor, and by that only.

The administratrix of the last prebendary and his successor must both found their claims on the grant of the donor of the property, out of which the prebend was founded, and the act of appropriation by which it was founded. From these are derived all the rights and privileges that belong to the prebend. To these we must look to see in what course of succession that prebend is to go; what fruits of it are ripe, and to be enjoyed by the person in possession, and those who represent him; and what are reserved for the successor.

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Unfortunately historians have been too much occupied in exhibiting the human character as it has displayed itself in the wars and intrigues that have engaged the attentions of mankind, to bestow much of their time in giving any account of civil or ecclesiastical institutions. Whoever wants information as to the establishment of these institutions must submit to the labour of collecting it for himself, from the records of the public offices. We have ourselves done so in this case, and I think that by connecting some unpublished documents with what is to be found in our law books, we ascertain that the more pious founders of churches, who not only divided portions of their lands, and the tithes of what they retained for their own use, for the maintenance of the ministers of the Gospel, but also gave the advowsons of the churches they founded, to the church, intended that such advowsons should be pure ecclesiastical trusts, which, after the dedication of them at the altar, were never to be disposed of by any layman. The church would have considered it as sacrilege in any layman to presume, under any pretence, to touch this sacred property.

The Roman Catholic Church, from which ours is derived, did not regard the personal representatives of its members. The policy of that church was to separate churchmen from their families, to prevent their acknowledging any connection but with the church.

In the infancy of that church, and before these laws were made by which the separation of priests from the world was completely effected, we find *Clement* declaring, in one of his constitutions (36), “*Omnium rerum ecclesiasticarum curam episcopus gerito et eas dispensato quasi instante Deo; non licitum ei esto quippiam ex iis sibi tamquam proprium assumere aut cognatis suis elargire quæ Deo dedicata sunt.*” Here the law for preserving the property of the church, and preventing it

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it from passing into the families of its members, was first declared. The principle laid down in that constitution has never been departed from, but repeatedly confirmed.

Several of the documents which we have obtained relate to the prebend of *South Grantham*. As these documents are not set out on this record, I shall not use them as evidence of any facts peculiar to this case, but as historical proof of the origin and nature of church patronage in general, and of the manner in which churches became possessed of their patronage, and how it has been dealt with. This patronage was first given to the whole body of the clergy of a diocese. The general body afterwards appropriated part of what they had in common, to the exclusive use of the bishops; other part to the deans and chapters; and with other part prebends were founded by the bishops, with the assent of the deans and chapters. This is stated by *Dr. Burn*, in his *Ecclesiastical Law*, tit. "*Appropriation*," and he is confirmed as to the first grant being to the body of the clergy of each diocese, by a grant which we found in the chapter-house of *Salisbury*, and which is also printed in 3 *Dugdale*, 371, by which *Osmond*, Bishop of *Salisbury*, Earl of *Dorset*, and nephew of *William* the Conqueror, and the founder of the church of *Old Sarum*, for the sake of his soul, and the souls of his ancestors, granted as follows:—

"Ego Osmundus Saresbur: Episcopus notifico omnib: Christi Fidelib: ad honorem Dei, et ecclesiam Saresbur: me construxisse, et in perpetuum concessisse has villas preter militum terras; Elminster, Wiltonia, Cerminster, &c. &c. *Ecclesias de Grantham cum decimis ceterisque ibidem adjacentibus*; — scripta est autem Hæc Carta et confirmata anno Incarnationis Domini 1091, Inductionis 14. Willo Rege Monarchiam totius Angliæ strenuè

strenuè gubernante anno 4. regni ejus apud Hastings
Hiis subscriptis Testibus, &c.”

Lord *Coke* is mistaken when he says, in 3 *Rep.* 75 b., “that at first all the possessions were to the bishop.” These possessions belonged to the whole body; and the whole body only could dispose of them: and accordingly we find, that these possessions, amongst which will be observed the *Ecclesiæ de Grantham cum decimis ceteris que ibidem adjacentibus* were afterwards appropriated by the church to different members. This is proved by the evidence book in the same chapter house, which states, that a general chapter of the members of the church was holden, (at what date is not known,) but it was previous to the removal of the church from *Old Sarum* to *Salisbury*, which took place in 1220, at which time the churches, with the tithes and other rights belonging to the body, were appropriated; some to the bishops, some to the deans, and some to the canons or prebendaries to whom the cure of the different churches was assigned. Dr. *Burn*, in the chapter to which I have already referred, tells us, that the prebendaries who, by means of such appropriations, became possessed of what were called prebendal livings, at first appointed curates to the duties of those churches, but they were afterwards required to make a better and more permanent provision for the officiating ministers. He gives us the form of the constitution of a vicarage, which he found in the church of *Carlisle*.

This form of Dr. *Burn* is like one which we have obtained from the church of *Lincoln*; namely, the constitution of a vicarage in one of the parishes belonging to the prebend of *Grantham*. By these ordinations of vicarages, as they are called, either portions of the tithes or an annual rent, and the advowsons of the vicarage, are reserved to the prebendary, and the residue is given to the vicars, on the condition of their performing the

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duties of the churches. One of the ordinations is in these words:

“ Rič de Newere capellanus p̄sent p̄ Galfrid̄ de Boclond Canonic p̄bende aust^olis de Grāham ad p̄petuam ejusdē p̄bende vicariam consensu dñi Sar̄i ⁊ capituli sui Sar̄i ad id accedenti ad eandē admissus est ⁊ in ea vicarius p̄petuus institut̄. Consistit antīdca vicaria in medietate alt̄gii tam de Grāham q̄m de Gunwardeby ⁊ in omnibus p̄ventibus altariā de Morton ⁊ de Breseceby ⁊ solvet vicarius dco G. ⁊ successoribus suis ejusdē p̄bende canonicis centū solid annuos nōie pensionis ⁊ in officio s̄c̄dotali p̄sonalit̄ ibidi minist̄bit sustinendo om̄ia om̄ia p̄oshialia dcam p̄bendam contingencia Et mand̄ est dco Archid̄ ut,” &c. (a)

There are also in the cathedral of *Salisbury* several grants of churches to the bishop: according to these grants, he and his successors are to take and dispose of these churches as he does of his other churches or prebends. All of these grants are of this form. As the churches were given to the whole body of the clergy of the diocese, the donor must have intended, that they should be disposed of only by the members of that body. The donors could not know that these churches would ever be appropriated to particular members of the body, and could not, therefore, intend that the lay representatives of any of the members could ever have the disposition of them. For if they had still remained in the aggregate corporation of the clergy of the diocese, personal representatives never could have any right.

They might have thought that the property given by them was for ever vested in the church, and that it could not under any circumstances ever be touched by

(a) In an ancient roll of endowments of vicarages in the time of *Hugh Wills*, bishop of *Lincoln*, who began to preside over the diocese in 1209, and now remaining in the registry of the bishop of *Lincoln*.

lay hands. When the churches afterwards appropriated portions of this property to different members, the only thing intended was, to give the exclusive possessions of the portions assigned to those members, to hold in right of the church by those members and their successors. The prebends thus constituted were made corporations sole, subordinate to the church, so that they and their successors were from time to time to represent the church, and to enjoy the rights which were derived from the church in return for the duties which they were to perform. Neither the donors nor the appropriators could intend that the personal representatives of deceased prebendaries should ever interfere with any thing that belonged to the church. The intent of both donors and appropriators is opposed to the Plaintiff's claim, and their intent must give the rule for our judgment. The ecclesiastical law in a case like the present, follows what, I trust, I have shewn must have been the intent of the donors of property to the church, and where the ecclesiastical law does not contravene the law of *England*; it is adopted into that law, and is to be followed by the temporal courts in the decisions of such cases as are within its influence.

Lord Coke in his *1st Institute*, §44. says, the ecclesiastical law is to prevail where it is not against the common law or any custom.

Lanwood, in his *Treatise de Consuetudine*, fol. 19 a. has this passage. "Si beneficiatus decedat intestatus, et non disponat de fructibus, de *Jure communi* Ecclesia in eis succedat. De consuetudine tamen posset esse quod per episcopum vel alium ad quem pertineret bona testatorum tueri, deberet distribui, ad decedentis debita solvenda."

The ecclesiastical law or common law of Christendom is here meant by *Jure communi*. By the words "*de consuetudine*," the custom of particular kingdoms is intended;

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disposed of only by sacred hands; that the ecclesiastical law in deciding between the last incumbent and the successor proceeds according to the intent of the donors and appropriators; that the custom of *England*, spoken of by *Linwood*, does not apply to a right of presentation to a vacant living; and further, that the ecclesiastical law must determine to whom such presentation belongs.

This intent of the donors prevents any analogy between ecclesiastical and lay patronage. The former is inseparably attached to the church, and to be disposed of only by churchmen; the latter is attached to the temporal estates of the founders of churches, and to be disposed of by those who happen to be the owners of the estates. Lay patronage being, from the conditions which its founders made, annexed to temporal estates, must sometimes pass, with the estates to which it is annexed, to infants and others incapable of exercising the right of presentation. This condition has occasioned a great defect in the law relative to this species of patronage; but as it must be disposed of by some one connected with the estate, it does not concern the public whether it belongs, in such a case as the present, to the heir or executor of the person last seized of the advowson; one of them is as likely to present a proper clerk as the other.

Ecclesiastical patronage is subject to no such condition.

The founders of ecclesiastical patronage looked to the advancement of religion; the founders of lay patronage to the maintenance of the influence of their families.

Courts of justice should not, unless compelled by some clear rule of law, take church patronage from the churchmen, whose situations and characters are security for the due exercise of it. By assigning it to the personal representatives of deceased patrons, they subject it to what it is from its original constitution exempt, namely,
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the chance of falling into the hands of incapable persons, such as infants and creditors.

I have said, that I think the difference between the object of the founders of ecclesiastical and lay patronage renders it impossible to reason analogically from the former to the latter; if there be any analogy between them, it raises an inference unfavourable to the Plaintiff.

The successor of a corporation stands in the same relation to his predecessor, that the heir to an estate does to his ancestor.

Now it was determined by the Court of Common Pleas, after two arguments in the case of *Repington v. The Governors of Tamworth School, 2 Wilson, 150*, that where a donative became vacant in the life-time of the owner of the advowson who died before it was filled up, the donative belonged to his heir, and not to his executor. This decision was pronounced on a motion in arrest of judgment. If the executor, when the judgment was arrested, had thought proper, that judgment might have been examined in a court of error; but it was never disputed.

Selden, in his *History of Tythes*, c. 12. fol. 380. vol. 3. p. 88., tells us, that until the time of King *John*, there was no institution; all livings were donatives. The judges, in the case above stated, confirm the account of this learned writer.

The heir must have had the donation in every such case as the present; and if the heir would have had it in lay patronage, — if analogy is to be referred to, — the successor must have it in ecclesiastical patronage.

If a person in right of his estate, or any public functions, has the appointment to any office that becomes vacant, and is not filled up during the life of the patron, the person who succeeds to the office or estate to which the patronage is annexed, has the right of ap-

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pointment. This is strictly analogous to the present case.

The office of exigenter became vacant during the life of *Brooke*, Chief Justice of the Common Pleas; Queen *Mary*, during the vacancy of the office of Chief Justice, appointed *Coleshall* exigenter. *Brown* was afterwards appointed Chief Justice, who removed *Coleshall* from his office, and admitted *Spraggs*. The Judges of the King's Bench, the Chief Baron, Attorney-General, and the attorney of the duchy, held, that this office was only at the disposal of the Chief Justice for the time being, as an inseparable incident to the person of the Chief Justice. *Spraggs v. Coleshall, Dyer, 175.*

I will now shortly consider the arguments urged in favour of the Plaintiff. It has been contended that the right of presentation to a vacant living, is by the vacancy severed from the advowson to which it belonged, and become a chattel, and that a chattel could not pass to the successor of a corporation sole, except under the statute of *Hen. 8.*, which conveyed only such fruits as fell during the vacancy.

Our law would be most absurd, if the determination of rights depended on names only. Either the right of presentation to a vacant benefice is not severed from the advowson, until such right has been fully exercised, and is not a chattel, or its being classed among chattels does not prevent it from passing to the successor. If this be not so, the donative in the case in *Wilson*, could not have belonged to the heir, for the right of donation was as completely severed from the advowson in that case, as the right of presentation in this.

The reference to the statute of *Hen. 8.* is unfavourable to the Plaintiff's argument; for *Gibson* says, it was only an affirmance of the common law, by which the fruits enumerated in it belonged to the successors; and the object of it was to put an end to the usurpations of the
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the bishops, who, in defiance of the common law, took fruits from those who succeeded to benefices.

Fallen fruits, or chattels severed from the living, did, therefore, pass to the successor by the common law.

It has been also insisted, that if the rights to such presentations were perpetually annexed to the church, and could in no case be exercised by laymen, the king could not take them as parts of the temporalities of bishops, abbots, and priors. The king takes these by his prerogative; his rights, although determined by law, are often different from those of a subject under similar circumstances. Bishoprics, abbeys, and priories were founded by the crown. The king is "*persona sacra*." He is supreme ordinary (*Com. Dig. Ecclesiastical Persons*); and was by the statutes of the 16 *Rich. 2.* and 25 *Hen. 8.* declared to have always been justly and rightly supreme head of the church. It cannot, therefore, be considered that the objection to a layman's interference with church patronage applies to the king. I would observe, that in the different abridgments of the law it is said that, in these cases, the right of presentation belongs to the king, and not to the bishop's executors.

It might have been inferred from the words "*and not to the bishop's executors*," that but for the intervention of the prerogative, the presentation would have belonged to the bishop's executors.

I have looked into the year books, and can find in the case referred to, nothing said about executors, nor was an executor a party in the cause. There is, therefore, no authority for the introduction of the words, "*and not to the bishop's executors*."

It has been said that as the estate which an ecclesiastic has in his church is of the same quality as that which a lay tenant for life has, the right of the personal representative of the former to present to a church, must
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be the same as that of the personal representative of the latter.

These estates are only alike in this, that each must determine with the life of its holder. The estate of the ecclesiastic may, indeed, determine before, by resignation, deprivation, or the acceptance of another benefice. But the estate of the tenant for life is held by him in his *own right*, and solely for his own benefit. The estate of the ecclesiastic is held in right of the church, and for the service of the church. On the death of a tenant for life, there is some person in existence who represents the estate. But on the death of a beneficed clergyman, his estate in the benefice is in abeyance until the appointment of a successor. (*Co. Lit.* 342 b.) The moment that successor is appointed, his estate relates back to the death of his predecessor, so that there is no time for the right of a personal representative of the latter to intervene.

The law, with respect to the exercise of the right of presentation, is different in the case of an ecclesiastical estate from what it is in the case of a lay estate. An ecclesiastical patron can only present one clerk, and if that clerk be rejected for insufficiency, the patron is not entitled to notice of his clerk being rejected. All ecclesiastical presentations state, that the person presenting is either bishop, or prebendary, or other person having church patronage, and that he collates or presents in right of his bishoprick, or prebend, or other dignity.

“ To the right reverend father in God *John*, by divine permission, Lord Bishop of *Lincoln*, to his vicar-general in spirituals, or to any other person or persons having or to have sufficient authority in this behalf; *William Dodwell*, doctor in divinity, prebendary of the prebend of *South Grantham*, antiently founded in the cathedral church of *Sarum*, and in right of that prebend,
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the true and undoubted patron of the rectory of *Welby*, in the county of *Lincoln*, and your lordship's diocese of *Lincoln*, greeting :

“ I present to your Lordship, and to the rectory and parish church of *Welby* aforesaid, now void by the resignation of *Basil Cave*, clerk, the last incumbent there, and to my presentation in full right belonging, my beloved in Christ *William Dodwell*, clerk, master of arts, humbly praying that your Lordship would be graciously pleased to admit, and canonically to institute him, the said *William Dodwell*, to the rectory and parish church of *Welby* aforesaid, to invest him with all and singular the rights, members, and appurtenances thereto belonging, to cause him to be inducted into the real, actual, and corporal possession thereof, and to do all other things which to your pastoral office may in this case appertain or belong. In witness whereof I have hereunto set my hand and seal this 27th day of *October*, in the year of our Lord 1775.

William Dodwell (L.S.)”

“ *John*, by divine permission, Bishop of *Salisbury*, to our well beloved in Christ, *Thomas Rennell*, clerk, B.D. Health, grace, and benediction. We do hereby freely, and out of mere good will, give and confer upon you the prebend or canonry of *South Grantham*, founded in our cathedral church of *Salisbury*, vacant by the death of *Robert Price*, clerk, L. L. D., the last prebendary thereof, and belonging in full right to our donation or collation by virtue of our bishopric :

“ And we do duly and canonically institute you in and to the said prebendary or canonry, and invest you with all and singular the rights, members, privileges, and appurtenances thereunto belonging (you having first before us made such subscriptions, and taken such oaths as are in this case by law required to be subscribed and taken) : And we do by these presents assign and appoint

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point to you the stall in the choir of our said cathedral church belonging to the said prebend or canonry, and to the same hitherto usually assigned, saving always to ourselves our episcopal rights, and the dignity and honor of our cathedral church of *Salisbury*. In testimony whereof we have caused our episcopal seal to be hereunto affixed, dated this 17th day of *April* in the year of our Lord 1823, and of our translation the sixteenth.

J. (L. S.) Sarum."

"*John*, by divine permission, Bishop of *Salisbury*, to our well beloved in Christ, *Thomas Henry Mirchouse*, clerk, M.A. Health, grace, and benediction. We do hereby freely and out of mere good will, give and confer upon you the prebend or canonry of *South Grantham*, founded in our cathedral church of *Salisbury*, vacant by the death of *Thomas Rennell*, clerk, B.D., the late prebendary thereof, and belonging to our donation or collation in full right by virtue of our bishoprick; and we do duly and canonically institute you in and to the said prebend or canonry, and invest you with all and singular the rights, members, privileges, appurtenances thereunto belonging, you having first before us made such subscriptions, and taken such oaths as are in this case by law required to be subscribed and taken; and we do by these presents assign and appoint unto you the stall in the choir, and place and voice in the chapter of our said cathedral church belonging to the said prebendary or canonry, and to the same hitherto usually assigned; saving always to ourselves and our successors, bishops of *Salisbury*, our episcopal rights, and the dignity and honor of our said cathedral church of *Salisbury*. In testimony whereof we have caused our episcopal seal to be hereunto annexed, dated this 13th day of *July*, in the year of our Lord 1824, and of our translation the eighteenth."

These

These forms of presentation shew the connection of the party presenting with the church. An administratrix could not use such words in her presentation. It behoves those who support her claim, to shew some law that would authorise a bishop to institute on a presentation that did not contain them.

A lay patron may present two persons and allow the bishop to take one of them. He may revoke his presentation and present another clerk; he is entitled to have notice of the rejection of his clerk for incompetency, and he does not name in his presentation the estate in right of which he presents.

If these patrons are subject to different laws whilst living, why must their patronage be subject to the same law when they are dead?

In 2 *Roll. Abr.* 346. it is laid down, "Si le parson doit presenter al vicarage, uncore si le vicarage devient void durant le vacancy del parsonage, le patron del parsonage presentera." *Rolle* refers to 19 *Ed. 2. quare impedit*, 178. It may be said, if the successor is the representative of the church, he should have presented. In this case it does not appear that there was any successor at the time of the presentation. Formerly patrons kept churches vacant for many years, and in the mean time took the fruits. It does not appear whether the patron was a layman or ecclesiastic. But I have looked through the 19 of *Edm. 2.*, and find only two cases of "*quare impedit*." In the first, the Plaintiff claimed to present as the heir of the person last seized of the advowson, and the question was, whether she was the heir or not: no point was made in favour of an executor: the second, which I think is the case alluded to by *Rolle*, was a case in which the king claimed to present to a living in the patronage of a prior during the vacancy of the priory. The case of a priory is like that of a bishop, and the king's claim is founded on his prerogative,

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prerogative, by which he is entitled to the patronage of vacant bishoprics, abbies, and priories. *Rolle* has therefore no authority for saying, that any other patron except the king in these particular cases would have had the right of presenting to a vicarage becoming vacant during the vacancy of the rectory.

It has also been urged on the part of the Plaintiff, that as an ecclesiastical patron may grant a right of presentation to a layman by deed, he may give a presentation that becomes vacant in his life time by his will, or that it will belong to his administrator if he makes no will.

I am not prepared to admit on the authority of the two cases cited, and I can find no other, that an ecclesiastical patron can grant the next presentation to any living in his patronage.

The case in *Hobart* does not decide the point. The judgment was, "that the words of the grant were insufficient to convey the right of presentation." The case in *Cro. Eliz.* cannot be law. The grant was of an archdeaconry, a judicial office. Without reference to the statute of *Ed. 6.* I think we should now scarcely endure to hear it argued, that one who had the appointment to a judicial office might assign that appointment. If he could grant it in his lifetime, this very case is an authority, that such a grant will not bind his successor, for the report states that such an assignment would be within the restraining statute of the 1 *Eliz.* But, although an ecclesiastical patron might grant the right of presentation when the church is full, does it follow that he could grant it when the church is void, and when his grant is not to take effect till after his death, and must bind his successor? such a grant would be against the letter of the restraining statute, and the passing of such patronage by will or letters of administration, which cannot take effect until the death of the testator or intestate, is against the spirit of that statute.

The

The options assigned to archbishops by bishops on their consecrations, have been mentioned. I do not pretend to decide on the validity of these grants, or on the rights of archbishops to bequeath by their wills the patronage conveyed to them. It is true that the trusts of such wills have been recognised in the Court of Chancery, but in the cases in which they came before that court, all the parties were interested in considering them legal, and no objection to their legality was made.

I have heard it said, that this right of the archbishops is derived from the Pope. *Linwood* says, the pope has "*Potestas supra jura.*" If in the exercise of this, which *Bellarmino* calls his *extraordinary authority*, he could give this right to the archbishops, such a right must be an anomaly in the law. But I think the papal power, both *ordinary and extraordinary*, had been overthrown in this country before these grants were first made. *Gibson* says, that the old practice was, for the archbishops to require bishops on their consecration to provide for some particular clergyman, leaving the provision to be made, and the time of making it entirely to the bishop; and that the first instance of an assignment of any particular benefice to the archbishop is to be found in the books of Archbishop *Cranmer*. If there are no such assignments of an earlier date, it would be difficult to support them without the aid of an act of parliament.

If, after all the labour that has been bestowed in investigating this case, there still remains a doubt how it should be decided, we are, I think, then permitted to consider the decision that will most advance the cause of established religion. We should lay down such a rule as is most likely to secure the presentation of the fittest persons to fill churches that are left vacant at the death of ecclesiastical patrons. My regard for the family of the excellent person whose death has occasioned this question,

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question, is too well known for it to be supposed that the observations I am about to make can be applied to them. But, generally speaking, I think it cannot be doubted that the successor is more likely to make a judicious and disinterested choice than the personal representative of the late prebendary. A presentation in the hands of an administratrix is like lay patronage, liable to fall into the hands of a person who is unfit for the exercise of such a trust; a woman, an infant, an ignorant person, or a disappointed creditor. The successor must be a clergyman, a dignitary of the church, a person whose education and habits qualify him to appoint, and whose situation and character are the best security for his making a proper appointment.

If we wanted an instance to prove how well and how disinterestedly ecclesiastical patronage is bestowed, I might mention that of the late prebendary of *Grantham*. I believe he was selected by the University of *Cambridge*, and by two distinguished prelates, for the situation which he held, only because he was known to be a person the best qualified to discharge the various and important duties of those situations.

The clergy know that the filling the churches with learned and pious clerks is the most effectual human means of lengthening the cords and strengthening the stakes of their tent.

Such dignitaries of the church as hold ecclesiastical patronage will, I hope, bestow it on such worthy clerks as are most able and desirous of promoting piety and morality. In this hope, I will never consent to withdraw it from the church by whom the original donors intended it should be administered, or to permit any layman under any pretence to interfere with the disposition of it. For these reasons, I think, our judgment should be for the Defendants.

Judgment for Defendants accordingly.

1825.

MAVOR, Assignee of W. H. PYNE, v. PYNE.

Nov. 9.

THIS was an action by the assignees of a bankrupt, for goods sold by him to the Defendant. The pleas were first, the general issue. Secondly, that after the promises stated in the declaration, and before the commencement of the action, and before *W. H. Pyne* became a bankrupt, he released the Defendant from all actions, to which it was replied, that *W. H. Pyne* had become bankrupt before the deed of release; and on this replication issue was joined. At the trial before *Best* & *C. J. Guildhall* sittings after *Trinity* term, it appeared that the bankrupt was author of a work called *The History of the Royal Residencies*, which he published by subscription, in twenty-four numbers, at one guinea a number. The numbers were printed, and left at the publisher's house ready for delivery monthly. Each subscriber received his numbers at the house of the bankrupt. The whole twenty-four numbers were completed. The Defendant only took away eight numbers, although he was informed that the remainder were ready for him. With respect to the release, although executed more than two months before the suing out of the commission, it appeared to have been executed after an act of bankruptcy; the Defendant knew that the bankrupt was insolvent at the time of executing it; and it did not appear that 100*l.* of the petitioning creditor's debt had been contracted within six

1. Where a verdict is found for the Plaintiff in an action by assignees, on a contract entered into with a bankrupt, before his bankruptcy, it is no ground for setting aside the verdict, that it did not appear that 100*l.* of the petitioning creditor's debt was contracted within six years before the suing out of the commission.

2. A release executed by the bankrupt after an act of bankruptcy, to a releasee who knows of the bankrupt's insolvency, is not valid, although executed more than two months before the suing out of the commission.

3. Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, a Plaintiff may sue for the numbers actually delivered, although the contract be not reduced into writing, as required by the statute of frauds.

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v.

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years before the suing out of the commission of bankruptcy.

The jury having found a verdict for the Plaintiff on both the issues,

Vaughan Serjt. moved for a nonsuit on several grounds. First, that it did not appear that 100*l.* of the petitioning creditor's debt had been contracted within six years before the suing out of the commission. Secondly, that the release was valid, inasmuch as it was executed more than two months before the issuing of the commission of bankruptcy, and that, at all events, the Plaintiff ought to have averred in his replication that the Defendant knew of the act of bankruptcy when he took the release. Thirdly, that the assignees could not sue the Defendant till the bankrupt's part of the contract was performed by the delivery of the whole twenty-four numbers; and, lastly, that the contract not having been reduced to writing was void by the statute of frauds, as the work was not to be completed within a year. *Boydell v. Drummond.*(a)

BEST C. J. The first objection which has been made to the verdict, is, that it does not appear, that 100*l.* of the petitioning creditor's debt was contracted within six years before the suing out of the commission of bankruptcy. I think it would be highly inconvenient to allow a debtor of the bankrupt's estate to make such an objection. This point was decided by the Court of King's Bench in the case of *Quantock v. England* (b) after much consideration, and Lord *Mansfield* in a case at Nisi Prius held, that the bankrupt himself could not, after having surrendered to his commission, avail himself of the statute of limitations.

These decisions came under the consideration of the

(a) 11 *East*, 142.

(b) 5 *Burr.* 2628.

present Chancellor in *Ex parte Dewdney* (a), and his Lordship confirmed the case of *Quantock v. England*, but held that the rule in that case should be confined to actions brought by assignees against the debtors of the estate, and could not be extended to cases in which the bankrupt disputed his bankruptcy, or to oppositions made by creditors to the proof of debts under the commission that were more than six years standing. We ought to diminish as much as possible the difficulties of maintaining actions to recover debts due to a bankrupt's estate. It would be wiser, I think, to prevent the bankruptcy from (b) being questioned in any action, except such as are brought for the purpose of trying the validity of the commission, by the bankrupt or any creditors who have a right to dispute it.

The second objection is, that although the release was after an act of bankruptcy, and the Defendant knew that the bankrupt was insolvent at the time it was executed, yet as the commission was not issued within two months after the release, Sir *Samuel Romilly's* act rendered the release valid, the Plaintiff not having in his replication alleged that the Defendant knew that the bankrupt had committed an act of bankruptcy or was insolvent.

I think the Defendant having pleaded that the release was executed before the bankruptcy, and it being proved at the trial that it was executed after, the plea was negatived, and the Plaintiff was entitled to a verdict on this issue.

The third objection was, that this action could not be maintained, the bankrupt not having performed his part of the contract. The short answer to this objection is, that the Defendant put an end to the contract, consequently the Plaintiff was entitled to recover for the amount of what he had performed.

(a) 15 Ves. 488.

(b) Vide 6 Geo. 4. c. 16.

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v.

PAYNE.

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PAYNE.

If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received. The bankrupt was the author of a work called *The History of Royal Residences*, which he published by subscription in twenty-four numbers, at the price of one guinea each number. The numbers were printed and left at the publisher's house ready for delivery monthly. Each subscriber received his numbers at the house of the bankrupt. The whole twenty-four numbers were completed.

The Defendant only took away eight numbers, although he was informed that the remaining numbers were ready for him.

The Defendant broke his bargain in not taking the other numbers, and was liable to pay for those he had, and the verdict is only for the eight that were received by him.

The case of *Boydell v. Drummond*, which has been referred to by the Defendant's counsel, shews that the statute of frauds will prevent Plaintiffs from recovering on the original contract, where it was not in writing, and not to be performed within a year. But neither the statute nor the case shew that Plaintiffs are not to be paid for numbers actually received by the Defendant. In *Boydell v. Drummond*, the Defendant had paid for all the numbers of the work subscribed for that he had received; and the question was, whether the executory part of the contract was binding, and the Defendant bound to take and pay for the residue of the work. The reasoning of the judges in that case is against the argument of the Defendant's counsel. They consider a subscription of this sort as a divisible contract,

The meaning of the contracting parties, when they say *twenty-four numbers, at one guinea each number*, is, that the publisher shall be paid as the numbers come out,

out, not that he is to wait until the work is complete before he receives any money.

One of the reasons for publishing in numbers is, that the publishers have not sufficient capital to complete an expensive work. Many of the most beautiful works which the public now possess, could never have been brought out unless the publishers had been paid as the numbers were delivered.

If the Defendant had not put an end to the contract, I should have no difficulty in saying, that the bankrupt was entitled to be paid one guinea by him for every number that he received.

The rest of the Court concurring, the rule was
Refused.

1825.
 MAJOR
 v.
 FAYNE.

WAISTELL v. ATKINSON.

Nov. 10.

ASSUMPSIT for the hire of a gig. Plea of tender, and payment into Court as to 5*l.* part of the demand, and *non-assumpsit* as to the rest. The Plaintiff having taken the 5*l.* paid in on the plea of tender, and having proceeded to trial, there was a verdict for the Defendant on the tender, and for the Plaintiff on the *non-assumpsit*, with 1*l.* 19*s.* damages.

A tender and payment into court, by which the Plaintiff's claim is reduced below 40*s.*, will not entitle the Defendant to enter a suggestion on the *London* court of conscience act, although the issue on the tender is found for the Defendant.

Spankie Serjt., on the part of the Defendant, upon an affidavit stating that he resided within the city of *London*, moved for a rule to shew cause why he should not be at liberty to enter a suggestion on the roll, in order to entitle himself to the benefit of the *London* court of conscience act, 39 & 40 G. 3. c. 104. He cited *Horne v. Hughes* (a) and *Cook v. Johnson* (b), to shew

(a) 3 *East*, 346.

(b) 2 *Price*, 19.

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that where a debt was reduced by part payment below 5*l.* before action brought, the case was within the act; he argued that a tender was equivalent to part payment, and he distinguished the case of *Heaward v. Hopkins* (a), in which the contrary had been holden, on the ground that it was decided on a different act of parliament, and before part payment had been holden to bring cases within the act.

BEST C. J. The case in *Douglas* is decisive on this point. The Court was of opinion in that case, that where a tender only was pleaded, no suggestion ought to be entered. There is no subsequent case in which that principle has been affected. In the case in the Exchequer, there was part payment, and to that extent the debt was extinguished, but it cannot be said to be extinguished by a tender.

Rule refused. (b)

(a) *Doug.* 448. (b) But see *Jordan v. Strong*, 5 *M. & S.* 296.

Nov. 18.

ANDERSON v. SHAW.

Where a Plaintiff does not appear, a verdict cannot be taken against him, though the Defendant pleads a tender.

THE Defendant, who had pleaded a tender, and paid money into Court, took down the record by proviso, and the Plaintiff not appearing, a verdict was taken for the Defendant upon the authority of *Gutheridge v. Smith* (a), and *Harding v. Spicer* (b), where it is laid down that a Plaintiff cannot be nonsuited after a plea of tender.

(a) 2 *H. Bl.* 377.

(b) 1 *Campb.* 327.

Onslow

Onslow, Serjt., on the authority of *Hicks v. Young* (a), *Gardener v. Davis* (b), and *Dennis v. Dennis* (c), in which the practice is laid down the other way, obtained a rule nisi to set aside this verdict.

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 ANDERSON
 v.
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Taddy, Serjt., who shewed cause, contended that the opinion of *Heath J.* in the two cases cited at Nisi Prius was correct, because the judgment of nonsuit is, "that the Plaintiff take nothing by his writ," whereas upon a plea of tender and payment of money into Court, it appears he takes something, and, therefore, cannot be supposed to abandon his suit.

BEST C. J. My opinion at the trial was, that as there was one issue on the Plaintiff, and the tender applied only to a part of the demand, a verdict could not be given against the Plaintiff in his absence.

The case of *Gutheridge v. Smith* was cited to me. I understood that in *Gutheridge v. Smith* it had been decided by the Court of Common Pleas, that when a tender was pleaded, there could not be a nonsuit, but the Defendant must have a verdict. I find that no other Judge says any thing on this point, but Mr. Justice *Heath*. The case in *Campbell* was also decided by the same learned Judge. No man can entertain a higher respect for the opinion of any Judge than I do for that of Mr. Justice *Heath*. If there was any thing like a defect in the comprehensive and accurate mind of that excellent man, it was, that it could not easily descend to the consideration of such points as that now to be decided. It was the practice to call the Plaintiff in every case: if he did not answer, no verdict could be given against him. At this day if the Plaintiff's coun-

(a) 2 *Barnes*, 458.

(b) 1 *Wils.* 300.

(c) 2 *Wms. Saund.* 336 b.

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ANDERSON
v.
SHAW.

sel informs the Court, whilst the jury are considering their verdict, that the Plaintiff does not appear, a nonsuit is entered. Can there then be any thing but a nonsuit, when, instead of disappearing just before the end of the cause, he does not appear at all? It is said, that when there is a tender, he takes something by his writ; so he does, if money be paid into Court, and he takes it out, and it has been often held, that a Plaintiff may be non-suited after payment of money into Court.

The verdict must be set aside.

PARK J. I am of the same opinion; there cannot be a verdict unless the Plaintiff appears, and there is no case which has established a contrary rule. In the case on which so much reliance has been placed, it is said, "in joint actions there cannot be a nonsuit, because of the incongruity." There is the same incongruity in the present instance, and though we have been pressed with the opinion of Mr. Justice *Heath*, the weight of authority the other way must prevail here.

The rest of the Court concurring, the rule was made
Absolute.

Nov. 19.

MUNN v. GODBOLD.

The Plaintiff had lost his part of an agreement under seal after it had been duly stamped.

COVENANT on an agreement under seal, by which, in consideration of the Plaintiff having for that purpose paid the Defendant 300*l.*, the Defendant agreed to consign to the Plaintiff 600*l.* worth of *Godbold's Vegetable Balsam*. Plaintiff was to be the agent, and the

At the trial of an action on the agreement, the Defendant, upon notice, produced his part, unstamped, and the Plaintiff, the draft of the agreement.

Held, that the Defendant's part, unstamped, might be received in evidence.

Defendant

Defendant was to take back, at the price paid for the same, all that the Plaintiff should be unable to dispose of in six months. Averment that the Plaintiff in that time was able to dispose of no more than would produce 1*l.* 6*s.* 8*d.* Breach that the Defendant refused to take back the residue, pursuant to his agreement. The Plaintiff excused himself from *profert*, by an allegation that the deed was lost. At the trial before *Best C. J.*, *London* sittings, after *Trinity* term last, the Plaintiff, after having given the Defendant notice to produce the counterpart, and having proved the loss of the deed declared on, which had been executed by the Defendant only, offered in evidence the draft of the deed; the Defendant's counsel at the same time produced the counterpart, executed by the Plaintiff only, and unstamped, and insisted that the draft could not be received, because the counterpart was in Court; and that the counterpart could not be received, because it was unstamped. The objection, however, having been overruled, and the unstamped counterpart holden to be admissible evidence of the lost deed, the jury found their verdict for the Plaintiff.

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 Munn
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Bosanquet, Serjt., having on the above objections obtained a rule *nisi* for a new trial,

Wilde, Serjt., now shewed cause. The Plaintiff was entitled to produce in evidence either the draft or the counterpart of the lost deed, because if both were rejected the Defendant would obtain an advantage by his own wrong in omitting to stamp the counterpart. The counterpart, if read, must be read as a copy, and not as a deed, because if it were read as a deed the Plaintiff must have been nonsuited, inasmuch as he had declared on a deed executed by the Defendant, and the counterpart was executed only by the Plaintiff. As a copy, it required no stamp.

L.

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Bosanquet. When a deed is lost, the next best evidence must be produced; and the counterpart is the next best: *Rex v. Castleton* (a), *Villiers v. Villiers*. (b) *Bull. N.P.* 254. But if the counterpart be produced, it must be produced as a deed, not as a copy; it being to all intents an original. If it be produced as a deed, it ought to have a separate stamp under the provisions of 55 G. 3. c. 184., if on no other ground, at all events, because the two instruments contain together more than 2160 words.

BEST C. J. On the trial the Plaintiff proved that there were two parts of the deed on which the action was brought, one of which, executed by the Plaintiff, was delivered to the Defendant, and the other, executed by the Defendant, was delivered to the Plaintiff. The loss of the latter was then shewn, and the Plaintiff's counsel offered a copy in evidence. Upon this the counsel for the Defendant produced the part executed by the Plaintiff, which was not stamped, and insisted that this part could not be read for want of a stamp, but that as it was in existence, and the best evidence of the contents of the lost deed, I could not receive any copy in evidence. I thought this part was the best evidence of the contents of the lost deed, but that it was admissible without a stamp; and it was accordingly read.

When there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than any other copy; and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The Courts have, therefore, always required, that if one part of a deed be lost and another part be in existence, it must be produced, or shewn to be in the hands of the oppo-

(a) 6 T. R. 236.

(b) 2 Atk. 71.

site party, and then on his refusing to produce on notice a copy may be received. In *Buller's Nisi Prius*, 254., it is said, "If it come out in evidence, that there are two parts executed, and the loss of one only is proved, perhaps a copy could not be admitted." In *Villiers v. Villiers*, Lord *Hardwick* says, "If an original deed is lost the counterpart may be read; and if there is no counterpart forthcoming, then a copy may be admitted." In *The King v. Castleton* it was held, that a person who had one of the parts of an indenture of apprenticeship ought to have been called to produce such part, and that no other evidence of the indenture could be received.

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These cases prove that the part of the indenture in the hands of the Defendant was the proper proof of the contents of the part that was lost.

Then comes the question, could this part be received without a stamp? I think it required no stamp. It was not produced as a deed, but merely as secondary evidence of the contents of another instrument which was lost.

It could not be read as a deed by the Plaintiff; because it was not executed by the Defendant, it was only used as an authenticated *copy* of the deed, which the Defendant had executed. Copies need not be stamped, and, therefore, this, which could only be read as a copy, required no stamp. In *Waller v. Horsfall (a)*, the Defendant being in possession of a stamped agreement the Plaintiff proved a notice to produce, and then offered an unstamped part, which had been executed by both parties. Lord *Ellenborough* said, "It may be received as a copy, although, if properly stamped, it might have been used as an original." In *Garnons v. Swift (b)* the Court held, that if the party who had the stamped part of an agreement did not produce it on notice, he who had the unstamped part might give secondary evidence.

(a) 1 *Campb.* 501.

(b) 1 *Taunt.* 507.

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v.

GOSBOLD.

I am, therefore, of opinion, that this paper was properly received, and that there ought not to be a new trial.

Rule refused.

Nov. 22.

LAKE v. SILK.

Arrest under the name of *Stephen T. Silk*. Bail-bond executed in the name of *Stephen Thomas Silk*: Held, ill.

THE Defendant was arrested on a *capias ad respondendum*, by the name of *Stephen T. Silk*; he afterwards executed to the sheriff a bail bond, in the name of *Stephen Thomas Silk*, by which, as was now stated on affidavit, he had always been called and known.

Bosanquet Serjt. having obtained a rule *nisi* to cancel the bond, under these circumstances,

Vaughan Serjt., who shewed cause against the rule, insisted, that the objection was waived by the Defendant's signing the bond.

To which it was answered, that a bail bond is signed by compulsion, and that the real waiver would have been, to have signed in the erroneous name of the arrest. *Taylor v. Butherman* (a) was relied on as in point.

Cur. adv. vult.

BEST C. J. We find ourselves fettered by the decisions in this court and the King's Bench, and as the party may have acted on those decisions, the bail bond must be set aside, but without costs. For the future we shall not give relief on motion in similar cases.

Rule absolute.

(a) 6 B. Moore, 264.

1825.

BROOK v. CARPENTER.

Nov. 23.

THIS was an action against the Defendant, for maliciously lodging against the Plaintiff, when a prisoner in the *Fleet*, a detainer, and detaining her, in an action on a bill of exchange for 10*l.*, having at that time no reasonable or probable cause for such detainer.

The termination of the Defendant's suit on the bill was averred as follows: "That such proceedings were thereupon had, that in *Easter* term 1825, by a certain rule or order made in the suit by the Court of Common Pleas, it was ordered, that the Defendant in that suit should be discharged out of the custody of the warden of the *Fleet* as to Plaintiff's suit in that action, and that all further proceedings in the cause should be stayed, and the bill of exchange on which the action was brought be delivered up to the Defendant; and the said action was and is, by means of the premises, and according to the course of the Court, wholly ended and determined."

At the trial before *Best* C. J., *Middlesex* sittings after *Trinity* term last, the prothonotary was called, and produced the rule of court in the above terms; he stated it to have been obtained on the affidavit of the party.

The admission of the rule was objected to, on the ground, first, that it did not shew any termination of the suit; secondly, that having been obtained by the affidavit of the party, it would, if received, enable her indirectly to give evidence in her own cause: but the learned Chief Justice permitted it to be read, and a verdict was found for the Plaintiff.

Wilde

1825.

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Wilde Serjt. moved for a rule *nisi* to set this verdict aside and enter a nonsuit, on the objections above stated. He cited *Habershon v. Tropy* (a), where in an action for a malicious arrest, Lord *Kenyon* refused to admit as a witness, to prove the circumstances of the preceding suit, an arbitrator who had examined the parties, and had made an award in favor of the Defendant in that suit.

Vaughan and *Lawes* Serjts. shewed cause. The rule was admissible from necessity. It was necessary for the Plaintiff to shew the termination of the preceding suit; and as it was terminated by the rule, the rule was the only evidence of its termination. In *Habershon v. Tropy* the arbitrator was called, not merely to shew the termination, but the circumstances of the preceding suit.

Taddy and *Peake* Serjts. in support of the rule.

The termination of the prior suit is a material fact towards the support of the Plaintiff's action; and if she be permitted to prove it by the rule, she does in effect prove it by her own affidavit, which cannot be permitted. Thus the record of a conviction is never admitted as proof of any injury for which redress is sought by action, for if it were, the Plaintiff would succeed by his own testimony. *Gilb. Evid.* 30, 31. *Rex v. Boston* (b), *Burdon v. Browning*. (c) In an action against the hundred, indeed, for a robbery, the party is permitted to give evidence of the robbery, from the necessity of the case, because in general no other evidence can be procured. But in the present instance the rule of Court might probably have been obtained by other evidence

(a) 3 *Esp.* 38.(b) 4 *East*, 572.(c) 1 *Taunt.* 520.

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than the Plaintiff's affidavit, and, therefore, ought not to be admitted in support of her action.

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BEST C. J. I was exceeding desirous that a rule to shew cause why there should not be a new trial, should be granted in this case, that we might ascertain whether I had allowed the rule for staying the proceedings in the first cause to be applied to the questions of malice or want of probable cause, or to influence the jury in assessing the damages. I recollected that I had admitted it in evidence, only to prove that the first cause was ended, because it was the only evidence by which that fact could be proved. It is now admitted, that it was used for no other purpose. Of this and of this only I now think it was legal evidence. It has been well observed at the bar, that when a suit has been terminated by rule of Court, unless the rule can be received in evidence, an action for maliciously holding to bail can never be brought in such a case. The rule of Court is receivable, on the principle of necessity, as you allow a Plaintiff to prove by his own testimony that he was robbed, in an action against the hundred, robberies being usually committed when no one is near but the person robbed and the thieves. Another case has been mentioned to me by Brother *Gaselee* — where a rule of Court is received in evidence, and none of us ever heard that it was objected to, because obtained on the oath of the party by whom it is produced; namely, in an action for trespass, when the trespass is committed under a writ that is set aside by the Court for irregularity. In that case the rule goes immediately to the point on which the whole cause turns.

In the present case the rule was only to prove a collateral fact. It has been said in argument, that if a party intends to bring an action for maliciously holding him

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him to bail, he must have the original cause disposed of by a verdict in his favour, or he must not offer his own affidavit in support of any rule that he intends to use in such an action. It would be a barbarous law that refused redress for an unjust imprisonment, because he who had suffered it chose to seek relief from his misery by a reference, or other legal mode by which it could be ended in a short time, and did not wait until he could bring his oppressor to a regular trial.

In this case, the Plaintiff at first only applied to be discharged out of custody. Upon that application being made, both parties, on the recommendation of the Court, agreed to refer the whole cause to the prothonotary, whose award was the foundation of the rule for determining the cause. With respect to the party's not joining in the affidavit, if he intends to offer in evidence the rule that he seeks to obtain, I think the Court would not be inclined to grant such a rule, if the party applying for it did not join in the affidavit. We should suspect that we were not informed of the whole truth. I am also disinclined to say, that a rule cannot be used in evidence for the purpose for which this rule was used, if obtained on the oath of the party using it. Regard to truth, which is the foundation of the law of evidence, can never require so strict a rule, and it would prevent us from affording relief in many cases of great oppression. I mean not to infringe on the principle, that a verdict in a criminal case cannot be given in evidence by the prosecutor in support of a civil action. We should, as far as we can, take from prosecutors every temptation to go beyond the truth in their evidence. This is a general rule, but necessity has occasioned some exceptions to it. A prosecutor obtains by the conviction of a felon restitution of his goods, and yet the prosecutor is a competent witness on the trial

trial of the felon. The owner of goods stolen can maintain no action to recover them until he has prosecuted the supposed thief.

If you prevent the owner of goods stolen from giving evidence on the trial of an indictment for the felony, because he may by such evidence obtain restitution of his goods without an action, you would often defeat public justice. It would be absurd to expect a prosecutor to bring his action, after the person who stole his goods is convicted.

In the present case it cannot be proved that the original suit is ended, but by the order by which the proceedings in it were stayed: from necessity, therefore; that order must be permitted to be read in evidence, for the purpose of proving the proceedings stayed, and for that purpose only. I am of opinion that the rule for a new trial should be discharged.

PARK J. concurred.

BURROUGH J. The production of this order was to prove nothing but that the former suit had terminated. As to the means by which that order was obtained, it would make no material difference whether it were procured at the instance of the party, or immediately upon her affidavit. It would be most oppressive, if the party could by any such objection be prevented from maintaining this action. She is unjustly confined in gaol, and according to the argument which has been used, she must lose all hope of redress for the wrongous imprisonment if she applies to this Court for her enlargement. The rule of Court which terminated the former suit, must indeed be received in evidence from the necessity of the case. If, as is clear, the termination of the suit must be proved, it can only be proved by shewing the act of the Court which effected its termination; and

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though that act should have been occasioned by the affidavit of the party, that circumstance, as it cannot dispense with, so it ought not to exclude the only proof of which the thing is capable. But in actions against the hundred, and other instances in which the evidence of the party interested is the only evidence which the case furnishes, it has always been received.

GASELEE J. The question for the decision of the Court lies in a narrow compass. In order to sustain an action for a malicious prosecution, the party suing must shew that the former suit is at an end; he must also state this in his declaration, as well as the means by which the suit was ended. In the present case the suit complained of was ended by rule of Court; and how can that be proved except by the production of the rule? The rule is put in, merely to shew that the suit was ended, and it is immaterial how the rule was obtained. It is urged, indeed, that the jury may be prejudiced by hearing the contents of the rule; (although the rule in the present instance shews none of the circumstances of the former cause;) but there are many cases in which evidence cannot be excluded, although it may avail to produce an unfavorable impression, as where the confession of a prisoner is read, which has often a tendency to implicate others. In civil actions too, what is said by one defendant is often binding upon another; so that this circumstance alone cannot be any ground for excluding the evidence; and as there was no other mode by which the fact could have been proved in the present case, the rule which has been obtained on the part of the Defendant must be

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Same Case.

THE rule for a new trial in this case having been discharged as above,

Wilde afterwards moved in arrest of judgment, that it did not appear upon the record that the first action was at an end before the second had been commenced. He argued that a stay of proceedings by rule of Court was not a termination of a suit, because the stay might be only temporary, and the action afterwards proceeded in, and because it would not, like a regular termination, be a bar to an action for the same cause in another court: further, as it was obtained by the affidavit of the party, he ought not to be permitted to proceed against his opponent upon no better foundation than his own testimony.

BEST C. J. It has been insisted that it does not appear on this record, that the action in which the Plaintiff was maliciously and without probable cause detained in prison, is at an end.

The declaration states a rule of Court by which it was ordered that the proceedings in this action should be stayed, that the Defendant should be discharged out of custody, and that the Plaintiff should deliver up the bill of exchange on which the action was brought. After such a rule that action could never be stirred again in this Court. If this Court had authority by rule to put an end to the cause, it was at an end. There are many cases in which actions may be stopped by rules of court. If ever this may be done, the Court will presume that it was rightly done, when it is attempted to arrest the judgment after the verdict of a jury. All of us know that the power of stopping the action was properly exercised in this case.

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Stopping the cause by rule of Court would not, it is urged, prevent the Plaintiff from bringing another action in another court; neither does a nonsuit on the merits; and yet if it were determined that when the Plaintiff in the original cause was nonsuited, no action could be brought against him for maliciously holding to bail, such a determination would be a receipt for a safe mode of indulging in oppression or revenge. A person who had gratified his malice by immuring in a prison a fellow creature for months, by not appearing when an indignant jury were about to deliver a verdict against him, might, if this were law, avoid an action for maliciously holding to bail. All that is required in such an action is, to shew that the first action is at an end, not that the cause of such action is finally decided on.

I am, therefore, of opinion, that it does appear in the declaration in this case, that the original action was at an end when the action for maliciously holding to bail was brought, and that we should not grant a rule to shew cause why the judgment should not be arrested.

Rule refused.

Nov. 25.

STRONG v. HARVEY.

1. An association of ship-owners for the mutual insurance of each other's ships, in which each member is only liable to the extent of his subscription, is not illegal under the 6 G. 1. c. 18.

2. Where, by the terms of a policy, losses were to be paid in three months after an adjustment by a committee of the insurers, and the committee refused to adjust upon the request of the insured: Held, he might sue on the policy, notwithstanding there had been no adjustment.

3. When a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, will not support a plea, stating that a certain portion of the sum was tendered for the debt of one.

4. An offer of a certain sum in full of a demand is not a legal tender.

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of *February* 1822, and from thence continually until the 15th day of *February* 1823, was a ship owner and member, together with Defendant and divers other persons, of a certain society or association called the *Pacific* Association; and that the ship or vessel thereinafter mentioned was from the day of the date and making of the policy of assurance, admitted into and entered in the said society; that Plaintiff theretofore, (to wit) on the 7th of *March* 1822, caused to be made a certain policy of assurance, purporting thereby and containing therein, that Plaintiff, as well in his own name as for and in the name and names of all and every other person or persons to whom the same might appertain in part or in all, did make insurance on the ship *Waterloo*, at and from all ports and places, not excepted by the rules of the association, from the 15th of *February* 1822 to the 15th of *February* 1823, for 1500*l.*, against all perils and losses; the assurers agreeing to contribute, each one according to the rate and quantity of his sum therein assured, and confessing themselves paid the consideration due to them for that assurance by the assured, at and after the rate of 12 guineas *per cent. per annum*: And Plaintiff averred; that the rules and regulations of the *Pacific* Association, mentioned in and referred to by the policy, and the indorsement thereon, were as follows: First, that Messrs. *Thomas Jackson, John Phillips, S. F. James, Davis Hewson, Samuel Bryan, Richard Harvey, and Benjamin Barrett*, be appointed a committee for settling averages, and managing the affairs of that association for the then present year: — The Plaintiff then set out several other rules to the number of twenty-four, among which were, — Third, that before any ship should be insured there should be paid five shillings *per cent.* on the sum insured, towards defraying the necessary expences; and there should also be paid the charge for the policy and power of attorney: Sixth, that ships under 200 tons should

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have 200 fathoms of cable, three bower anchors, and two kedges, and ships of 200 tons and upwards, should have 240 fathoms of cable, three bower anchors, and two kedges, and that a chain cable of ninety fathoms, approved by the surveyors, should be allowed in lieu of one rope cable for a vessel of 200 tons and upwards, and that eighty fathoms of such chain cable should be allowed to a vessel of a less tonnage, but that ships of 350 tons and upwards, sailing to the *East Indies*, should have not less than 300 fathoms of good cable: Eighth, that no sails cut away or lost (save and except those going with the masts), nor cables washed from the decks, should be allowed under average: Fourteenth, that in case of loss or average, the same should be paid for in two months from adjustment: Twenty-fourth, that the several ship owners, whose names were thereunder written, did severally and respectively, but not jointly or in partnership, or the one for the other of them, but each of them only, in his own name and on his own account, thereby mutually agree to insure each others' ships, from twelve o'clock at noon of the day of entry of each vessel into that association, until twelve o'clock at noon of the 15th day of *February* 1823, and that the foregoing rules were and always should be considered as binding upon all the members, as if inserted in and made a component part of the policies: Plaintiff then averred that the policy of assurance with the said memorandum and indorsement was so made by him for and on the part and behalf of himself; that the assurance so made was made for the sole use and benefit of himself; and that the said writing or policy of assurance was subscribed with the name of Defendant and divers other persons, by an agent of the said several persons, as assurers for the sum of 1500*l.*, upon the premises in the policy of assurance mentioned: And thereupon, in consideration of the premises, and that Plaintiff had paid five shillings

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per cent. on the said sum of 1500*l.*, towards defraying the necessary expences, and also the charges due, according to the third rule or regulation above-mentioned; and that Plaintiff, at the special instance and request of Defendant, undertook and promised to the Defendant to perform and fulfil all things in the said policy of assurance, memorandum, and rules and regulations contained on his part and behalf to be done, performed, and fulfilled; the Defendant undertook and promised, that he would become and be an assurer to Plaintiff, for his part and proportion of the said sum of 1500*l.*, of and upon the said ship or vessel, upon the terms and according to the policy of assurance, memorandum, and rules and regulations, and would perform and fulfil all things in the policy of insurance, memorandum, and rules and regulations contained on his part and behalf to be performed and fulfilled: And the said ship or vessel was, from the day of the date of the same policy of assurance, (to wit) on the said 15th of *February* 1822, admitted into and entered in the said society or association.

The Plaintiff then averred, that he was interested to the extent of the sum insured, and alleged damage by stranding, in consequence of which he was obliged to lay out money (to wit, 1000*l.*) in repairs, to throw goods overboard, to be piloted and assisted into the port of *Savannah* by the crew of another vessel, whereby general average losses became chargeable, the proportion of which, payable by Plaintiff, amounted to a large sum, (to wit) 1000*l.*

Averment, that Plaintiff had always been willing that such losses and damage should be adjusted according to the rules of the association, and that Defendant ad notice of this; that Plaintiff requested Defendant and the committee to settle and adjust the losses and damage, but that they refused to do so, although a

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reasonable time for that purpose had long since elapsed; and in particular, two months since the time when the adjustment ought to have been made: by means of which premises the Defendant was liable to pay his proportion of the 1500*l.*

There were several other counts, but the above came nearest to the case made out in evidence.

The Defendant pleaded, that as to the alleged necessity of being piloted and assisted into the port of *Savannah*, and as to the residue of the demands in the declaration, except as to the extent of 3*l.* 2*s.* 9*d.*, he did not undertake and promise in manner and form as the Plaintiff had complained. As to the 3*l.* 2*s.* 9*d.*, he pleaded a tender, on which issue was taken.

At the trial before *Best C. J.*, *London* sittings, after *Trinity* term last, it appeared that the Plaintiff and Defendant were members of an association of ship owners, who, under the regulations indorsed on the policy on which the Plaintiff had declared, had entered into a mutual engagement for the insurance of each others' ships. The Plaintiff's ship, the *Waterloo*, within the time for which she was insured, had run upon the *Tortugas* shoals, on the coast of *Florida*, in her homeward voyage from *Jamaica* to *England*. Upon that occasion she sustained some damage, but after throwing part of her cargo overboard, was assisted in getting off the shoal by a privateer under *Colombian* colours, and some pilots called wreckers from *New Providence*, to each of whom a portion of the cargo was given for their services. The Plaintiff, who was on board his own ship, instead of proceeding to the *Havannah*, the nearest port, or to *New Providence*, received into the *Waterloo* the lieutenant and six of the crew of the privateer, sailed to *Savannah* in the United States, of which country the captain and lieutenant of the privateer were natives. The lieutenant then in-

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stituted in the Admiralty Court at *Savannah* a suit for salvage, when 12,000 dollars were awarded to the privateer for her services, though the cargo of the *Waterloo* had cost no more than 24,000 dollars.

The members of the association having reason to suspect that the whole of the transactions at *Savannah* were a fraudulent contrivance between the Plaintiff and the captain of the privateer, requested to examine the Plaintiff touching those transactions before they adjusted the average: The Plaintiff attended the committee, but upon his refusing to explain how he became possessed of a sum of more than 5000 dollars, with which he had purchased at *Savannah* a considerable portion of the ship's cargo which had been sold to satisfy the decree for salvage, the committee refused to adjust the average. The Plaintiff then commenced actions on the policies for 1522*l.* 5*s.* 11*d.*, when the members of the association by their agent, offered to the Plaintiff, and afterwards to the Plaintiff's attornies, to pay 400*l.* 11*s.* 1*d.* in full of the Plaintiff's demand, explaining to one of the attornies, that that sum included the Defendant's contribution to the insurance, 3*l.* 2*s.* 9*d.* It did not appear that the money was actually produced, but the Plaintiff's attornies made no objection to the offer as being an informal tender, although the party making the offer said he had no bill less than 10*l.* with him: however, the offer being refused on the ground that more was due, the cause proceeded. In the progress of the trial it was agreed, that if the claim in respect of what had been paid for salvage, should be found untenable, it should be referred to an arbitrator to determine whether the 400*l.* 11*s.* 1*d.* tendered to the Plaintiff was sufficient to pay the whole loss sustained, independently of the decree for salvage. After a very detailed investigation of the proceeding at *Savannah*, the jury found a verdict for the Plaintiff, but found also that his conduct at *Savan-*

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nah was fraudulent: thereby negating in effect that part of his claim which rested on the decree for salvage.

Vaughan Serjt. obtained a rule *nisi* to set aside this verdict and enter a nonsuit, or a verdict for the Defendant, on the ground that the plea of tender had been sufficiently made out; or to arrest the judgment on the ground, among other objections, that the policy declared on was void under the 6 G. 1. c. 18., and that an adjustment of the loss by the committee of the association was a condition precedent, the fulfilment of which was necessary to entitle the Plaintiff to sue.

Taddy Serjt., who shewed cause, was relieved by the Court from arguing the questions respecting the tender and the nullity of the policy. He then contended, that the adjustment by the committee was not a condition precedent to be alleged in the declaration, but a matter the absence of which was to be proved by the Defendant in opposition to the Plaintiff's claim; and he likened the case to that of *Hotham v. East India Company(a)*, where a covenant in a charter-party, that no allowance should be made for short tonnage, unless such short tonnage should be made to appear on the ship's arrival, on a survey to be taken by four shipwrights, was holden not to be a condition precedent, but matter of defence: at all events, if the adjustment were a condition precedent, the Plaintiff was discharged, by having offered to do all in his power to fulfil it, and by the Defendant's refusal to proceed after he had called on them.

Vaughan and *Wilde* Serjts., in support of the rule, argued that the tender having been made to a professional person, and no objection having been made by

(a) 1 T. R. 638.

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him, on the ground that the money was not actually produced, that circumstance did not invalidate the tender; the ceremony of producing the money might be dispensed with, and had been dispensed with here. Then as to the adjustment by the committee, it was the first and most important of all the regulations of the association, was the chief object which the members composing it had in view, in order to avoid more expensive modes of settling disputes, and was therefore clearly a condition precedent. The Plaintiff calling on the committee to come to an adjustment was not a sufficient performance of the condition on his part; he ought to have furnished the committee with all the materials to enable them to form a judgment.

The objection on the statute 6 G. 1. was not further insisted on, being of a nature likely to affect the credit of the association.

BEST C. J. It is properly admitted that the policy of insurance in which this action is brought is not against the 6 G. 1. c. 18. That statute (to secure to the two great companies the monopolies they had purchased of government) rendered invalid the policies of insurance of other corporations, or of any persons insuring as a society or in partnership; but permitted parties to insure with individual underwriters as before. The assured and all the underwriters on this policy, are members of a society for the insurance of ships. But this society has no joint stock; it enters into no joint contract; the individual members are alone answerable for any loss that may happen to property insured, according to the terms of their separate contracts.

The advantages of insuring in such a society are, that the members know each other's responsibility better than they can know that of general underwriters: as none are admitted members but such as are possessed
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of ships of their own, all of them have some property to answer for any losses for which they may render themselves liable. Men united in such a society can better detect frauds in the assured, and at the same time they will restrain each other from setting up dishonourable defences against fair claims. These are great advantages, but, fortunately, they were not thought of when the statute of *George* the 1st was passed, or they would, probably, have been bartered away for a further loan to the state. There is neither the inclination nor the power to do such things now.

It is insisted that the Plaintiff cannot recover, because his loss has not been adjusted according to the terms of the 14th article on the back of the policy. It was proved that the Plaintiff applied for an adjustment, and that the Defendant refused to adjust, and this proof supports some of the counts in the declaration. But it is said that the Defendant refused to adjust, because the Plaintiff's claim was fraudulent. If this were true to the extent of his whole claim, it would be an answer to the action, but the jury have found that there was nothing fraudulent in the Plaintiff's conduct, until after the ship was carried into *Savannah*, and the Plaintiff had a claim for general and particular average before the ship arrived at *Savannah*. This part of the claim the Defendant ought to have adjusted, and paid two months after adjustment. The amount of this part of his claim is referred to arbitration. If that exceeds what is paid into court on the tender, the Plaintiff must have a verdict for that on the general issue.

This brings me to the question on the tender. The witness who was to prove the tender said that he offered the Plaintiff 400*l.* 1*1s.* 1*d.* *in full* for his claim on the policy, and that the Plaintiff went away before the witness had an opportunity of telling him what part of this money was on account of the Defendant.

pendant. The witness then went to *Cross*, one of the attornies of the Plaintiff, offered him the same sum, informed him that *3l. 2s. 9d.* was on account of Defendant, and told *Cross* this was in full for the Plaintiff's demand. The witness tendered the same sum, and in the same manner, to *Lowless*, the other attorney of the Plaintiff.

He never mentioned to the Plaintiff or *Lowless* what was offered on account of the Defendant. He never gave either of the persons an opportunity of taking the Defendant's proportion of the *400l. 11s. 1d.* They could not have taken the *3l. 2s. 9d.*, for the witness said he had no bill of less than *10l.* with him. When a man has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, will not support a plea stating that a certain portion of the sum offered was tendered for one of them. It is not true that the sum stated in the plea was ever tendered.

To make it a good tender, the Plaintiff should have had an opportunity of having the *3l. 2s. 9d.* on account of the Defendant, and without taking what was offered on account of the other underwriters.

A creditor might be disposed on many accounts to take less than his demand against one debtor, and to exact all that he thought due to him from others.

If one sum may be offered for all the debtors, a creditor can make no such distinction between them. Besides, the witness said, that what was offered was to be taken in full of the Plaintiff's claims. It has been properly ruled at *Nisi Prius*, that the making such a condition prevents the offer from being a legal tender.

It is enough that the Plaintiff, after a tender, goes on at the peril of paying costs, if he does not recover more than that amounted to. The Defendant has no right to say, if you will not give up all further claim that you may have, you are not to take what by my offer I admit is due to you.

I think,

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I think, therefore, the verdict negating the tender should not be disturbed. Whether the verdict on the general issue is to be for the Plaintiff or Defendant, must depend on the award of the arbitrator, to whom the amount of particular and general average, excluding that occasioned by the condemnation and sale at *Savannah*, is referred.

PARK J. I am of the same opinion. The legality of this policy turns on the statute of 6 G. 1. It has been holden with referepce to deeds such as the present, that if they contain a provision for rendering all the subscribers liable in case of the insolvency of one, such provision will constitute a partnership; but if each subscriber be only individually liable, the association does not fall within the meaning of the statute. *Lees v. Smith (a)*, *Harrison v. Millar (b)*.

With regard to the tender, I regret it cannot be considered valid; but it is impossible to overrule the numerous cases on that subject.

BURROUGH J. This association does not constitute a partnership, because there is no joint profit and loss to be divided among the members. The tender having been conditional, cannot be supported.

GASELEE J. As the tender was offered in full of all demands, I am bound to say that it was conditional. The verdict must, therefore, be entered for the Plaintiff, with nominal damages on the plea of tender.

Rule discharged.

(a) 7 T. R. 338.

(b) 7 T. R. 340. *in notis.*

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STRONG v. RULE.

Nov. 25.

THIS was an action against another underwriter on the same policy as in the preceding case, but the Plaintiff having omitted to set out in the count of the declaration to which the evidence applied, the rules and regulations of the association indorsed on the back of the policy, a verdict was taken for the Plaintiff, with leave for the Defendant to move to set it aside and enter a nonsuit instead.

Where the regulations of an association of ship-owners, combined for the mutual assurance of each others' ships, were indorsed on the back, and were declared to form part of a policy of insurance, to which the shipowners were subscribers: Held, that the declaration in an action for a loss under the policy ought to set out the regulations as well as the policy.

Vaughan Serjt., having obtained a rule *nisi* accordingly, on the ground of the variance between the contract stated in the declaration, and that proved at the trial;

Taddy Serjt., who now shewed cause, argued that the insurance being stated in the declaration to be on the ship at any port or place, "not excepted by the rules of the association," the rules were sufficiently referred to, to be given in evidence, and as there had been no demurrer, the count was sufficient after verdict. It is only necessary to set out so much of a contract as contains the entire consideration, *Clarke v. Gray* (a), and the entire consideration, the twelve guineas premium, is stated here. The regulations on the back of the contract do not amount to exceptions to its generality, in which case they must have been set out, *Latham v. Rutley* (b), or conditions precedent; but are in the nature of a defeasance, and might furnish matter of defence if they had been contravened.

(a) 6 East, 564.

(b) 2 B. & C. 20.

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BEST C. J. The contract stated in the declaration, and that proved at the trial, are entirely different. The regulations of the *Pacific* association are by the last rule to be considered as binding on all the members, as if inserted in and made a component part of the policies. Many of these regulations form part of the contract of insurance.

The third and twenty-fourth qualify the meaning of the words "confessing ourselves paid the consideration due to us for this assurance by the assured, at or after the rate of twelve guineas *per cent. per annum*," and shew that twelve guineas was not paid in money as the declaration states, but by an assurance to that amount by the Plaintiff on the ships of the underwriters in his policy. The sixth article obliges the assured to provide a specified number of anchors and a certain quantity of cable to the satisfaction of the company's surveyor, instead of leaving it as under a common policy to the ship-owner to provide such anchors and cables as are fit for his ship. The eighth relieves the underwriters from particular averages to which, under the policy set out in the declaration, they would be liable.

It is unnecessary to mention any other of these rules that materially alter the situation of the contracting parties. None of the regulations being set out in the declaration, the contract on which the action is founded is not correctly stated. The averment of the payment of a money premium is disproved, and the rule for entering a nonsuit must, I think, be made absolute.

The rest of the Court having expressed opinions to the same effect, the rule was made

Absolute.

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WALKER v. RIDGWAY.

Nov. 26.

THIS was an action against the Defendant for not properly setting out his tithes.

At the trial before *Burrough J.* last *Hereford* summer assizes, it appeared that the Defendant, after reaping his wheat, set it up in shocks of varying numbers, 6, 7, 8, and 9, the binder throwing out every tenth sheaf for the parson. It was admitted that no fraud was intended, and the jury found a verdict for the Defendant.

To place a wheat crop in shocks of varying numbers, and throw out the tenth sheaf, is not a legal mode of setting out tithes, although there be no fraud.

Wilde Serjt., obtained a rule *nisi* for a new trial, on the ground that this mode of setting out tithes was illegal, as not affording the parson an opportunity of judging whether or not the sheaf thrown out was fairly chosen.

Taddy Serjt., who shewed cause, maintained that this was a question solely for the jury, and that in the absence of fraud it must be presumed that the parson had a fair opportunity of comparison.

BEST C. J. The fairest mode of setting out the tithe of wheat is in the sheaf, and that is the mode prescribed by the common law.

The tithe-owner has a better opportunity of judging of the equality of the size of the sheaves when they are lying on the ground, than after they are huddled together in shocks.

But the uncertainty of weather, which often makes it proper for the interest of the tithe-owner as well as the farmer that wheat should be put up into shocks before

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the tithes can be taken, has given rise to customs for setting out the tithe in shocks. But where such custom prevails, shocks must all contain the same number of sheaves of equal sizes, otherwise the clergyman, without a minute examination of each shock, cannot be assured that he has as much as he is entitled to. The witnesses say that some of the shocks contained six sheaves and some eight. The clergyman could not, without great trouble, take his tithe from a crop of wheat so disposed. It is said, that there was in this case no actual fraud; but the law requires that the farmer, although he acts honestly, shall not so set out his tithe, as to make it difficult for the clergyman to know whether he acts honestly or not.

I think there must be a new trial.

PARK J. In questions concerning the setting out tithes, the absence of fraud is not the only circumstance to which the Courts will direct their attention; they will take care, not only that there shall be no fraud, but no possibility of committing it.

BURROUGH J. It is clear that this mode of setting out tithes is bad. Putting the sheaves in shocks of six instead of ten is productive of great inconvenience to the tithe-owner, and I told the jury that such a mode of setting out tithes could not be sustained.

Rule absolute. (a)

(a) Gaselee J. was absent at Chambers.

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CROFTS v. WATERHOUSE.

Nov. 26.

THIS was an action against a coach proprietor for having, by the negligence and improper conduct of his servants, overturned and injured the Plaintiff in travelling by the Defendant's coach. At the trial before *Littledale J.*, Dorset Summer assizes 1825, the Plaintiff's witnesses proved, that the Defendant's coachman, in turning a corner on the right hand side of the road, had driven so near to the side as to gather a bank, by which the coach was overset; that, though this was between two and three in the morning, there was a full moon, and light enough to distinguish objects of all kinds; that the road was twenty-four feet wide, and, at the time, clear of all obstructions, so that there was nothing to prevent the coachman from keeping to the middle or even the left side of the road. The defence set up, was, that between the time of the disaster, and the time when the coachman had last passed the spot where it happened, (about twelve hours before,) the first of two cottages which stood close to the corner in question, had been pulled down and the rubbish left by the side of the road; that the coachman mistaking the second cottage for the first, and wishing to save his horses by going as close to the corner as possible, drove out of the road over the rubbish of the demolished cottage.

The learned Judge who tried the cause told the jury, that as there was no obstruction on the road, the coach-

Accordingly, the Court granted a new trial, on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence.

The driver of a stage-coach gathered a bank, and upset the coach. He had passed the spot where the accident happened, 12 hours before, but in the interval, a landmark had been removed. In an action for an injury sustained by this accident, the Judge told the jury, that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the accident having been occasioned by his deviation, the Plaintiff was entitled to a verdict.

A verdict having been returned ac-

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man ought to have kept within the limits of it; and that the accident having been occasioned by his deviation, the Plaintiff was entitled to a verdict. A verdict having accordingly been found with 150*l.* damages,

Wilde Serjt. moved for a new trial on the ground of a misdirection, contending that it ought to have been left to the jury to ascertain whether the deviation had been occasioned by negligence or by unavoidable accident, because if it happened by unavoidable accident the Defendant was not responsible; a carrier of passengers, not being, like a carrier of goods, an insurer against all hazards except the act of God or the king's enemies; nor a coachman, bound to keep to the left side of the road when no other carriage is passing; for which he cited *Aston v. Heaven* (a) and *Christie v. Griggs* (b); and he likened the case to that of a master of a ship who should fall into peril by reason of a sea-mark having been removed or varied.

A rule *nisi* having been granted,

Onslow and *Taddy Serjts.*, who showed cause, insisted that deviation from the limits of the road, on a moonlight night, was of itself an inexcusable act of negligence; and the deviation having been noticed in the charge to the jury, the question of negligence was sufficiently before them.

BEST-C. J. The coachman was bound to keep in the road if he could; and the jury might, from his having gone out of the road, have presumed negligence, and on that presumption have found a verdict for the Plaintiff. But the learned Judge, instead of leaving it to the jury to find whether there was any negligence, told them that

(a) 2 *Esp.* 533.(b) 2 *Campb.* 79.

the coachman having gone out of the road, the Plaintiff was entitled to a verdict.

This action cannot be maintained unless negligence be proved; and whether it be proved or not is for the determination of the jury, to whom in this case it was not submitted. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and when every thing has been done that human prudence can suggest for the security of the passengers, an accident may happen. The lights may, in a dark night, be obscured by fog; the horses frightened, or, as it happened in the present case, the coachman may be deceived by a sudden alteration in objects near the road, by which he had used to be directed on former journeys.

It is not his fault, if having exerted proper skill and care, he from accident gets off the road; and the proprietors are not answerable for what happens from his doing so. I think this case must be again submitted to a jury.

PARK J. The distinction between carriers of goods and carriers of passengers was not sufficiently left to the jury. A carrier of goods is liable in all events except the act of God or the king's enemies; a carrier of passengers is only liable for negligence. It is not clear that negligence can be laid to the defendant's charge in the present case, for his coachman had no means of

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knowing that the cottage, his accustomed land-mark, had been removed.

The rest of the Court concurring, the rule was made absolute.

Rule absolute.

Nov. 26.

HOMER v. ASHFORD and AINSWORTH.

Declaration,— that the Defendant, for the considerations mentioned in the deed declared on, (which the Plaintiff brought into court,) covenanted to submit to certain particular restraints in the carrying on of his trade, which covenant he afterwards broke : Held, on general demurrer, that this was a sufficient statement of consideration for the restraint agreed to.

COVENANT. The Plaintiff declared, — for that whereas before the making of the indenture thereafter mentioned, the Defendant, *Joseph Ashford*, had hired himself to the Plaintiff for a certain term, determinable in a manner then agreed upon by them the Plaintiff and *Joseph Ashford*, in the capacities of clerk, book-keeper, and traveller, in the trade of a saddler's ironmonger, then carried on by the Plaintiff; and *Joseph Ashford* had agreed with the Plaintiff not to work for or be employed by any other person during the said term, without the licence and consent of the Plaintiff in writing under his hand for that purpose, first had and obtained; and whereas *Joseph Ashford* afterwards, and whilst the said term was still undetermined, was desirous of entering into partnership in the same trade of a saddler's ironmonger with the Defendant, *James Marsh Ainsworth*, but was prevented therefrom by reason of the said term being still undetermined; and thereupon afterwards by a certain indenture made between the Plaintiff of the one part, and the Defendants of the other part, (one part of which indenture, sealed with the seals of the Defendants, the Plaintiff brought into Court,) reciting (among other things) that in pursuance of a proposal

posal to that effect made by the Defendants, and assented to by the Plaintiff, the Defendants, for the considerations therein mentioned, did thereby for themselves, jointly and severally, and for their joint and several heirs, executors, and administrators, covenant and agree with the Plaintiff, his executors, administrators, and assigns, that the said Defendants or either of them, their or either of their traveller or travellers, or any other person or persons on their or either of their behalf, should not nor would, on any account or pretence whatsoever, enter into or pass through to solicit or take orders, the towns mentioned in the schedule B. thereunder written, or any of them, in taking their first north and west journey, within forty-two days of the several days set opposite the said towns respectively in schedule B. at which the Plaintiff presumed that he by himself or his traveller or travellers should enter, or should leave the said towns in the said schedule respectively mentioned; and also, that the Defendants or either of them, their or either of their traveller or travellers, or any person or persons on their or either of their behalf, should not nor would during the term of fourteen years from the day of the date of the deed, on any account or pretence whatsoever, enter into or pass through to solicit or take orders, the towns mentioned in the schedules A. and B. after their said first north and west journey as aforesaid, nor the towns mentioned in schedule C. thereunder written, within fifty-six days of the several days set opposite the towns respectively in the said several schedules mentioned, at which the Plaintiff presumed that he by himself or his traveller or travellers should enter or should leave the said towns respectively, without the licence or consent in writing of the Plaintiff, his executors or administrators for that purpose first had and obtained; and

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that

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that in case the said Defendants or either of them, their or either of their traveller or travellers, or other person or persons on their or either of their behalf, should and did enter into and pass through to solicit or take orders the said towns mentioned in the said schedule B., or any of them respectively, in taking their said first north and west journey, within forty-two days; and the towns mentioned in schedules A. and B., after their first north and west journies as aforesaid, and the towns in schedule C. within fifty-six days of the several days set opposite the said towns respectively, in the said several schedules, during the term of fourteen years from the day of the date of the deed, without the licence and consent in writing of the Plaintiff, his executors or administrators, for that purpose first had and obtained; then that the Defendants or one of them, their or one of their executors or administrators should and would immediately after entering the said towns in the said several schedules mentioned, or any or either of them, within the times aforesaid, well and truly pay or cause to be paid unto the Plaintiff, his executors, administrators, or assigns, the full and just sum of 50*l.* of lawful money of *Great Britain*, as and in the nature of stipulated damages for every order which they or he, or their or either of their traveller or travellers, or other person or persons on their or either of their behalf, should solicit or take for the sale of any goods, wares, or merchandizes in any and every of the said towns which they or he, or such traveller or travellers, or other person or persons, should so enter.

Breach, that the Defendants entered *Cheltenham, Eseter*, and *Oxford*, and other towns mentioned in the schedules, and solicited and obtained orders within the days and term prohibited.

Plea, that the performance and observance by the defend-

defendants of their covenant in the said indenture and declaration mentioned; and of which covenant, the Plaintiff had assigned the breaches, would entirely and wholly hinder, restrain, and prevent the Defendants for a long space of time, to wit, for the space of fourteen years, from carrying on, using, and exercising their aforesaid trade and business of saddlers' ironmongers in any or either of the said towns of *Cheltenham*, *Exeter*, and *Oxford*; and, therefore, the covenant in the said indenture mentioned and so declared upon as aforesaid, was and is in restraint of trade; and, therefore, the said covenant was and is void.

Demurrer and joinder.

Taddy Serjt. was to have supported the demurrer, but the Court called on

Adams Serjt. for the Defendants. He abandoned the plea, and argued that the declaration was bad, as not shewing any consideration for the restraint imposed on the Defendants. *Prima facie*, every restraint on trade is illegal: a general restraint is wholly void; and in order to sustain a restraint for a particular place or time, there must be a consideration, of the adequacy of which the Court must be enabled to judge: *Mitchell v. Reynolds* (a); Serjt. *Wms.* note to *Hunlocke v. Blacklow* (b); *Chesman v. Nainby* (c); *Davis v. Mason* (d); *Gale v. Reed* (e): and though deeds in general are presumed to be made on sufficient consideration, yet this presumption cannot be raised in favour of a deed which is on the face of it illegal, and which can only be shewn to be legal by the allegation and proof of an adequate consideration. But as the declaration in the present case does not shew what was the con-

(a) 1 *P. Wms.* 181.

(b) 2 *Wms. Saund* 156.

(c) 2 *Str.* 739.

(d) 5 *T. R.* 118.

(e) 8 *East*, 80.

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sideration for the defendants' submitting to the restraint imposed on them, the Court has no means of determining its adequacy, and the deed cannot be supported.

Taddy contra. It appears on the declaration that there was a consideration, for it is stated that the Defendants agreed for the considerations contained in the deed; if those considerations had been inadequate, their inadequacy ought to have been pleaded. The law requires that there shall be a consideration for every restraint of trade, but not that the consideration shall always be set out on record. The adequacy of the consideration is a matter of fact which may be made the subject of proof, but the Court is not bound to go into it without such proof, unless its insufficiency appear on record.

Cur. ad. vult.

BEST C. J. The first object of the law is to promote the public interest; the second to preserve the rights of individuals.

The law will not permit any one to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen, (and the present case is a strong instance of it,) that individual interest, and general convenience, render engagements not to carry on trade or to act in a profession in a particular place, proper. Manufactures or dealings cannot be carried on to any great extent without the assistance of agents and servants. These must soon acquire a know-

knowledge of the manufactures or dealings of their employers. A merchant or manufacturer would soon find a rival in every one of his servants, if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry. For partial restraints, however, there must be some consideration, otherwise they are impolitic and oppressive.

What amounts to an adequate consideration is to be decided by the courts of justice. We have none of us had any difficulty in saying, that the consideration stated in this record is abundantly sufficient to support the deed on which the action is brought.

The counsel for the Defendant admits that the plea is bad, and insists that the declaration does not state a sufficient consideration. If he had specially demurred, his objections would have been worthy of consideration; but although the declaration may be loosely drawn, we think we can see upon it enough to support the action. It appears from it, that *Ashford* had engaged himself as the *clerk, book-keeper, and traveller* of the Plaintiff for a term that was not expired, and that during this term of service *Ashford* was not to be employed for any one without the Plaintiff's consent in writing: that *Ashford* was desirous of entering into partnership with *Ainsworth* for the purpose of carrying on the same trade as the Plaintiff was engaged in, but was prevented from forming such partnership by his engagement with the Plaintiff: the declaration does not state in terms that *Ainsworth* was desirous that *Ashford* should be released from his engagement with the Plaintiff: *Ainsworth*, however, is a party to the deed by which *Ashford* was released from his engagement to the Plaintiff, and was enabled

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enabled to employ the knowledge of business, and his influence with the Plaintiff's customers for the benefit of the firm of which *Ainsworth* was to be a member.

It seems to us, that it was a reasonable condition of releasing *Ashford* from his engagements, and thereby enabling both Defendants to form their partnership, that they should not be permitted to seek for orders in the towns which *Ashford* had travelled as the rider of the Plaintiff, until after the Plaintiff had been enabled to visit his old customers, who resided in these towns, for the space of fourteen years from the date of that deed. We know the influence that a rider has over the customers of his employer, and with how much effect he may use the argument — encourage young beginners. This influence is gained by the liberality of his employer, and ought not to be used against him. But it has been argued, that all deeds in restraint of trade are bad, unless a sufficient consideration for such restraint appears on such deeds. I think, that if a sufficient consideration is admitted by the pleadings, the deed may be supported, although the deed itself does not express a sufficient consideration. None of the cases on deeds restraining trade have decided that the consideration must appear on the deeds. There are other cases which prove that considerations out of the deeds may be shewn by the pleadings. These cases are referred to in the great case on the subject before us, in *Peere Williams*; 1 *Vent.* 108.; *Dyer*, 146. It might be different if the pleadings instead of admitting a consideration, had raised a question whether there was any consideration. Perhaps the rules of evidence would not admit that any thing should be added to what was stated in the deed. I throw out this only that I may not be precluded by our judgment this day from considering the question whenever it shall be necessary to decide it. We all think, that as the declaration states that the Defendants for the *considerations in the deed mentioned, covenanted, it*
appears

appears that the deed was for *some* consideration. The Defendant should have craved oyer of the deed, if he meant to object to the sufficiency of the consideration, and not having done so, we are to presume that it contains a legal consideration.

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For this reason the Court is of opinion that judgment must be for the Plaintiff.

Judgment for the Plaintiff accordingly.

A'COURT v. CROSS. (a)

Nov. 23.

THIS was an action of *assumpsit* to recover the sum of 30*l.*; to which the Defendant pleaded the statute of limitations, averring that the cause of action did not accrue within six years.

Defendant being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a threepenny receipt stamp, and I will never pay it." Held, not such an acknowledgment as would revive the debt against a plea of the statute of limitations.

The cause was tried before *Gaselee J.*, at the last *Somersetshire* assizes, when the Plaintiff, in order to take the case out of the statute, proved that the Defendant said, on being arrested, "I know that I owe the money; but the bill I gave is on a threepenny receipt stamp, and I will never pay it."

The learned Judge did not consider this a promise to pay, so as to take the case out of the statute, and directed the Plaintiff to be nonsuited, giving him leave to move to set the nonsuit aside, and enter a verdict for the sum of 30*l.*

Wilde Serjt. accordingly obtained a rule *nisi* to set aside this nonsuit and enter a verdict for the Plaintiff, upon the ground that the acknowledgment of the debt made by the Defendant had taken the case out of the

(a) The Reporter was furnished with this case by a friend.

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statute of limitations. *Bryan v. Horseman* (a), *Swan v. Sowell* (b), *Mountstephen v. Brooke* (c), *Rowcroft v. Lomas* (d), *Leaper v. Tatton* (e).

Spankie Serjt., who shewed cause, contended that the effect of the recent cases was almost to throw the statute into desuetude; but even in *Bryan v. Horseman* the Court intimated, that if the matter had been *res integra*, their decision might have been the other way: and in the earlier and better authorities, better because they came nearer to contemporaneous expositions of the statute, it had always been holden that a mere acknowledgment was not sufficient, but that there must be an express promise to take a case out of the statute. *Bass v. Smith* (f), *Lacon v. Briggs* (g). In *Hyeling v. Hastings* (h), the Court thought that the acknowledgment was, at most, only evidence of a promise, but not matter upon which, if found specially, the Court could give judgment for the Plaintiff. If, however, the Court would imply a promise from a bare acknowledgment, unaccompanied with a refusal to pay, they could never imply a promise in the face of such an express refusal as had been proved in the present case. To do so would carry the consequences of an acknowledgment far beyond any thing hitherto decided. The statute was passed with the salutary intention of ensuring tranquillity, and of protecting men against claims which might be brought forward after a lapse of time, during which the evidence necessary to repel them might entirely have disappeared. But the intention of the statute would obviously be defeated, if an unguarded acknowledg-

(a) 4 *East*, 599.

(b) 2 *B. & A.* 759.

(c) 3 *B. & A.* 141.

(d) 4 *M. & S.* 457.

(e) 16 *East*, 420.

(f) 12 *Vin. Abr.* 229.

(g) 3 *Atk.* 105.

(h) *Ld. Raym.* 422.

ment were holden to bind a party at any distance of time.

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Wilde relied on the recent decisions, particularly *Bryan v. Horseman*, *Trueman v. Fenton (a)*, and *Lloyd v. Maund (b)*, in which the point had been settled after much consideration.

BEST C. J. I am sorry to be obliged to admit that the courts of justice have been deservedly censured for their vacillating decisions on the 21 *Jac.* 1. c. 16.

When by distinctions and refinements, which, Lord *Mansfield* says, the common sense of mankind cannot keep pace with, any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the statute; or if it be in the common law, settling it on some broad and intelligible principle. But this must be done with caution, otherwise we shall increase the confusion that we attempt to get rid of: the authority of no one Court is sufficient in such a case. I will therefore go no further to-day than I am authorised to go by the authority of the modern decisions.

The statute says, that actions on the case, account, trespass, debt, detinue, and replevin, shall be brought *within six years after the cause of action, and not after.*

These actions, it will be observed, are mentioned in the same section of the act, and the limitation of the time within which they must be brought is the same in all of them.

In all of them, except assumpsit, the six years commences from the moment there is a cause of action, and that time cannot be enlarged by any acknowledgment. But in assumpsit it has been holden, that although six years have elapsed since the debt was contracted, if the debtor promises to pay it within six years, he cannot avail

(a) *Cowp.* 548.(b) 2 *T.R.* 762.

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himself of the protection of this statute, because this promise, founded on a moral consideration, is a new cause of action. It seems to me the Plaintiff should have been required to declare specially on this new promise, and ought not to have been permitted to revive his original cause of action, for which the statute expressly declares no action shall be brought. By the present practice, the Defendant has not such distinct information, as, I think, he is entitled to, that the plaintiff means to avail himself of some promise to recover a stale demand. The real cause of action is kept entirely out of view, and one that cannot be supported brought forward. This is inconsistent with what is said to be the intent of special pleading.

The Courts, however, have not stopped here; they have said acknowledgment of a debt is sufficient, without any promise to pay it, to take a case out of the statute. I cannot reconcile this doctrine, either with the words of the statute, or the language of the pleadings. The replication to the plea of non-assumpsit *infra sex annos* is, that the Defendant did undertake and promise within six years. The mere acknowledgment of a debt is not a promise to pay it: a man may acknowledge a debt which he knows he is incapable of paying, and it is contrary to all sound reasoning to presume from such acknowledgment that he promises to pay it; yet without regarding the circumstances under which an acknowledgment was made, the Courts, on proof of it, have presumed a promise.

It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the act to the last section, every word of it shews that it was not passed on this narrow ground: It is, as I have heard it often called by great judges, an act of peace. Long dormant claims have

have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The legislature thought that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed, and took away the legal power of recovering it. I think, if I were now sitting in the Exchequer Chamber, I should say, that an acknowledgment of a debt, however distinct and unqualified, would not take from the party who makes it the protection of the statute of limitations. But I should not, after the cases that have been decided, be disposed to go so far in this Court, without consulting the judges of the other Courts. There are many cases from which it may be collected, that if there be any thing said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the statute of limitations.

In the present case the Defendant, at the time he acknowledged the debt, said he would not pay it, because the Plaintiff had arrested him.

I cannot, therefore, say that there was any cause of action within six years before the bringing of the action, and the rule for setting aside the nonsuit must be discharged.

The rest of the Court concurring, the rule was
Discharged.

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Nov. 24.

RICHARDSON v. MELLISH.

Where a general verdict was given on a declaration, some of the counts of which were bad, the Court amended the *postea*, by entering up judgment on a single count, after argument in error, in K. B.

THIS cause was tried before Lord *Giffard* and a special jury at the *London* sittings after *Hilary* term 1824, when a general verdict was found for the Plaintiff, on a declaration of several counts. In *Trinity* term, in the same year, this Court, after three days' hearing, discharged a rule *nisi* for a new trial, and for an arrest of judgment; which arrest of judgment had been moved for on the ground that the declaration stated no consideration for the Defendant's agreement, or that at all events the agreement was illegal. (a) The cause was then removed by error into the Court of King's Bench, and now, in this term, after argument on error, but before the Court of King's Bench had pronounced judgment, it having been suggested that a general verdict had been given, and that some of the counts in the declaration were bad,

Bosanquet Serjt., upon an affidavit that the amendment was necessary to the due administration of justice, obtained a rule *nisi* to amend the *postea*, by entering the verdict on the first count only of the declaration, pursuant to the notes of the learned Judge, Lord *Giffard*, who tried the cause. These notes being read, it appeared that the evidence applied to the first count: that the consideration for the Defendant's agreement to reinstate the Plaintiff in the command of the *Minerva East India* ship upon the contingency of certain events which afterwards

(a) See *ante*, vol. ii. p. 229. At the time of that report, no objection having been made to the generality of the verdict, an abstract of the first count, which alone the evidence applied, was thought sufficient.

occurred,

occurred, was, as stated in that count, the Plaintiff's surrendering at the Defendant's request, the command of that ship for certain voyages to which the Plaintiff had been appointed with the approbation of the *East India Company*, by owners who were about to sell the ship to the Defendant: that the commander of an *East Indiaman* cannot be removed after he has been approved of for a particular voyage, without the consent of the Company: that the former owners wished to sell the *Minerva* as a ship to which no commander was attached: that the Plaintiff refused to give up the command: that the Defendant, after his agreement with the Plaintiff, wrote to obtain the consent of the *East India Company* to the Plaintiff's exchanging the command of the *Minerva* for that of the *Marquis of Ely*; and that at the end of this letter the Plaintiff wrote that the exchange was made with his sanction and approbation, whereupon the company assented to the exchange (a). It also appeared that his Lordship was satisfied with the verdict, and thought the amendment ought to be made. It was observed that the original record remained in this Court, a transcript only being transmitted to the court of error, and *Williams v. Breedon* (b), *Shoat v. Coffin* (c), *Doe v. Perkins* (d), and *Petrie v. Hannay* (e) were cited to shew that such an amendment might be made after error, or at any time. The rule was granted on condition of a retaxation of costs, under which the Plaintiff was to return what he had received on the counts to which the verdict did not apply.

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Laws and *Wilds* Serjts. shewed cause against the rule at considerable length. Their argument in substance was, that this being an application to the discretion of the Court,

(a) The above particulars are taken from the judgment of the Chief Justice; post, 338.

(b) 1 B. & P. 329.

(c) 5 Burr. 230.

(d) 3 T. R. 749.

(e) 3 T. R. 659.

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it would not be a proper exercise of that discretion to allow the amendment, after so great a length of time had been permitted to elapse through the laches of the Plaintiff: *Grant v. Astle (a)*, *Harrison v. King (b)*: that he ought at the trial, or within the next term, to have elected on which count he would enter his verdict: *Lee v. Muggeridge (c)*: that the application ought to have been made to Lord Gifford: and that the Plaintiff having received the costs upon all the counts of the declaration, he was, in a manner, estopped, to apply to confine his verdict to one. They observed that whatever *dicta* might be found, there was no decision in which an amendment so important as this had been made after argument on error: that in all the cases reported, the amendment had been confined to mistakes of the officer of the court, and had never extended to errors committed by the party; for which they cited, not only *Doe v. Perkins* and *Petrie v. Hannay*, but *Williams v. Brendon*, *Short v. Coffin*; and they read the language of Buller J. in *Eddowes v. Hopkins (d)*, "If there were only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the Judge, and entered only on those counts; but if there were any evidence which applied to the other bad or inconsistent counts, as, for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict, there the *postea* could not be amended, because it would be impossible for the Judge to say on which of the counts the jury had found the damages, or how they had apportioned them:" *Holt v. Scholefeld (e)*. As it did not appear but that the evidence in the present case, or some part of it, might have applied to many counts besides the first, it was im-

(a) *Doug.* 730.

(b) 1 *B. & A.* 161.

(c) 3 *Taunt.* 36.

(d) *Dougl.* 376.

(e) 6 *T. R.* 695.

possible to say on which of them the jury had given their verdict.

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BEST C. J. It has been admitted by those who oppose the rule, that it is a question of discretion whether we should allow the *postea* to be amended or not.

In the exercise of our discretion, we must be governed by these considerations; first, is the count on which it is now proposed to enter the verdict, supported by the evidence offered at the trial? secondly, was all the evidence given at the trial admissible under that count? thirdly, are we prevented from acceding to the application on account of its having been made after the record has been removed by a writ of error, and the case has been argued in the Court of King's Bench?

Upon the first question, Lord *Gifford* has informed us that the evidence given at the trial proves the first count. In strictness, perhaps, we ought to look no further, but be satisfied with the opinion of the Judge who tried the cause. But as he has referred us to his report of the evidence, it has been read to the Court, and I think it fully proves the first count.

An agreement was given in evidence, exactly corresponding with that count. It appears from this agreement that the Plaintiff was commander of the *Minerva*, an *East India* ship, which the Defendant was disposed to purchase, provided the Plaintiff would give up the command of her, and allow one *Mills* to be appointed to her upon condition of the Plaintiff's being reinstated in case of *Mills's* death, and provided the *East India* Company would assent to this agreement between the Plaintiff and Defendant.

This imports, that either in consequence of some bargain between the former owner and the Plaintiff, or some rule of the *East India* Company, the Plaintiff could not, without his consent, be removed from the command

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of the ship. This is completely made out by the evidence.

It appeared at the trial that the former owners had, with the approbation of the Company, appointed the Plaintiff to command the ship for the next voyage.

If this had been a common merchant's ship, the appointing the master for the voyage and his acceptance of that appointment would have amounted to an agreement that the master should go that voyage, and if the owners afterwards removed the Plaintiff from the ship, without just cause, they would have been liable to an action for breach of the agreement.

But this was an *East Indiaman*, and it appears further from the evidence, that the commander of an *East Indiaman* cannot be removed after he has been approved of for a particular voyage, without the consent of the Company.

It was proved at the trial that the former owners wished to sell this as a free ship, that is, a ship to which no commander was attached, and that the Plaintiff refused to give up the command of her to them.

It was further proved, that after the agreement between Plaintiff and Defendant, the Defendant wrote to the directors of the *East India Company*, requesting them to permit the Plaintiff to exchange the *Minerva* for the *Marquis of Ely*, under which letter the Plaintiff wrote, that this exchange was with his sanction and approbation.

It was then proved by a person from the *India House*, that upon the receipt of this letter orders were sent to swear the Plaintiff into the command of the *Marquis of Ely*, and Mills into the command of the *Minerva*.

It seems to me, that this shews that the Plaintiff could not have been compelled to give up the then next voyage in the *Minerva*, and that it was probable, that if he conducted himself properly, the Company would have

have obliged the Defendant to continue him in command of that vessel, during the other voyages for which he was engaged.

At all events, the giving up the first voyage was a sufficient consideration to support this agreement. The death of *Mills* was then proved, the Plaintiff's application to be restored to the *Minerva*, the Defendant's refusal, and the loss occasioned to the Plaintiff by that refusal.

Upon the second question, namely, whether any evidence that was not admissible under the first count was received at the trial? I must observe, I can find no evidence that was not admissible under the first count. That being the case, the jury can have given no damages which they were not warranted in giving in a verdict upon that count.

I can see no objection to confining a verdict to one count, where no evidence was given but what was admissible under such count, even although it might prove some other count. In the cases of slander to which we have been referred, evidence was received of the speaking of words that were not actionable, and that, not by way of aggravation of the words which were actionable, but as amounting to a substantive cause of action. These words would not have been permitted to have been so proved, but for the bad counts which the declarations contained. If in these cases the courts had allowed the verdict to be taken on the good counts only, the Plaintiff would have recovered damages for words which were not the subject of an action.

In *Eddowes v. Hopkins Buller J.* says, "If there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the Judge, and entered only on those counts; but if there was any evidence that applied to the bad counts, (as, for instance, in an action for words,

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where some actionable words were laid, and some not actionable, and *evidence given on both sets of words*, and a general verdict,) then the *postea* could not be amended, because it would be impossible for the Judge to say on which of the counts the jury had found the damages, or how they had apportioned them."

This learned Judge is not here made to express himself with his usual distinctness. It might be inferred from the words, "If *there was only evidence at the trial upon such of the counts as were good*," that if the evidence proved the bad counts as well as the good, the *postea* could not be amended: but the reference to an action of slander where some words were proved, which were not actionable, shews that Mr. J. Buller meant that the *postea* could not be amended where evidence was admitted under the bad counts, which could not have been received under the good. In the case of *Williams v. Breedon*, we find the same learned Judge concurring with the rest of the court in allowing such an amendment where evidence had been given which could not have been received under the good counts, it clearly appearing that the jury had not been induced by such evidence to give any damages. This is the true principle. The damages in the present case cannot have been increased by the bad counts, because there is no evidence that would not have been submitted to the jury if those counts had not been upon the record.

Is this application made too late to be attended to? There are authorities for our amending the *postea* after argument in a court of error. It is never too late to do (in proper terms) what is necessary to be done to prevent injustice. If such an objection as has been started in this case, had occurred to me sitting in the Exchequer Chamber, I should have proposed to that Court, without any application from the bar, to send to the
 King's

King's Bench to ascertain if the difficulty would not be removed by amendment. In *Grant v. Astle*, Lord *Mansfield* laments that so ill-founded a rule should ever have been established as that in civil actions, one bad count should oblige the Court to arrest the judgment, whilst, in criminal cases, a prisoner might suffer the last punishment on an indictment, which has many bad, and only one good count; but, says his Lordship, as the rule is now settled, we have gone as far as we can by allowing verdicts in such cases to be amended by the Judge's notes. It is true, his Lordship did not think that could be done after judgment. Such amendments, however, have been made after judgment in many cases that have come before the Court since that of *Grant v. Astle*.

I am of opinion that this rule should be made absolute.

PARK J. I am of the same opinion. This rule is to amend the *postea*. It has been argued that this is an application to the discretion of the Court, meaning the sound and legal discretion of the Court: that in order to set that discretion afloat, it is requisite to shew some necessity: and that the affidavit on which the application is made, states no other necessity than the due advancement of the administration of justice. I cannot conceive a case of much greater necessity. If the Court did not make this amendment, they would be defeating the due administration of justice, instead of advancing it. For as the case now stands, I must take it for granted, and the Court thought so in the former occasion, that the jury have done quite right in giving heavy damages. It has been contended that my Lord *Gifford* should be applied to on this occasion; but that is not necessary. Application is usually made to the Judge who tried the cause, and if he be a judge who has left the Court, the Court itself, by its authority, may amend the *postea*.

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postea. But it is said, this application is too late, though it is admitted that if it had been made at *Nisi Prius* to Lord *Gifford*, or the counsel had been called on to say on what count they should take the verdict, it would have been of course to have entered it so. Might not the application have been made in the next term? Undoubtedly it might. It is impossible counsel can direct their attention to these things always at the moment; and has the attention of the Court ever been drawn to this point before? It has not. The case was argued generally on the insufficiency of consideration, and the Court in giving judgment, not having their attention drawn to this or that particular count, stated generally there appeared to be a sufficient consideration. The case of *Doe v. Perkins*, which shews that length of time is not of itself a sufficient objection to allowing the amendment, has been met by the case of *Harrison v. King*; that case, however, has no bearing on it at all on the present. There the alteration was proposed after a writ of error argued, judgment reversed, and a lapse of eight years. It would have been most outrageous to have acceded to such an application, and the Court would have shewn a bad discretion, if after that, they had amended. But that does not contravene the point that when the error is discovered, as appears in this case before the judgment of the Court of error is pronounced, the parties may come to the original Court in which the proceedings were, to endeavour, if they can, to rectify what is a mere slip or omission of counsel; for there is no earthly reason to suppose that if application had been made to Lord *Gifford* at the time of the trial, or within a short period of time afterwards, he would not have directed the alteration to be made.

Under these circumstances, I am of opinion that the rule should be made absolute.

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BOROUGH J. I am of the same opinion. I remember the case being argued; the Court took great pains to understand the question as to the bye-laws of the *India Company*; the counsel for the Defendant stated every thing they could state; and it was not, until after very full consideration, we formed an opinion on it. I have formed an early opinion on the present point I admit, for I have known this subject canvassed in public and in private a hundred times over, and I know the principle is, that you may permit an amendment to be made at any time when you can see your way. That has been the course uniformly all my time. Under all the circumstances, I think, upon the merits of the case, there cannot be a question on the point; if there were any difficulty about the damages, we might refuse the application, but there is none. The first count is proved, and the damages are applicable to the breach of agreement alleged in that count.

We have applied to the proper source, to the learned Judge who tried this cause; he has furnished us with his notes, and has expressed himself satisfied, not only that this amendment may be made, but that it ought to be made; and I am clearly of opinion that this rule ought to be made absolute.

GASELEE J. We have been called on to consider whether, circumstanced as this Court is, we can make the amendment required, or whether it should be made by the learned Judge who tried the cause. If that Judge were now a Judge of this Court, we should not have interposed; but he has been applied to, and he has reported to the Court what his opinion is: he doubts if he is the proper person to make the amendment, and he calls on us for our assistance.

I consider the Court as sitting at the request of Lord *Gifford*, to consider the case, and it appears to me,

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me, the Court acting in aid of Lord *Gifford*, and having heard the arguments addressed to it, may proceed on those arguments, coupled with the evidence which he has reported to us.

With respect to the time of the application I should have felt some difficulty, had I not found that in a case cited the amendment was allowed, after a writ of error had been brought and an argument had taken place. It does not appear to be material whether the error be the misprision of the clerk or the misprision of the attorney who takes the verdict. I think the true ground is this; whether or not there are substantially differing and distinct causes of action stated on the record, on all of which evidence is given, so that it is impossible to sever the damages. It was with that view the attention of the bar was called to the case of *Williams v. Breedon*. The marginal note of that case is, "When a general verdict has been given on two counts, one of which is bad, and it appears by the Judge's notes that the jury calculated the damages on evidence applicable to the good count only, the Court will amend the verdict, by entering it on that count, though evidence was given applicable to the bad count also." In this case it appears the several counts disclose but one cause of action, and the evidence given applies precisely to the first count. Looking at the statement in the record, if there had been distinct breaches, and evidence had been given as to breaches which were not contained in the first count, I should have said you could not have obtained judgment on the first count; the Court would have presumed some damages were given for some of those breaches in the second or third count; but the breaches assigned in the various counts alleging in effect the same cause of complaint, this could not have been the case. It has been stated, the Plaintiff has gone on against repeated notice. But I do not find, when this
 case

case was before the Court, on a motion for a new trial or arrest of judgment, that our attention was drawn to the difference between the counts. I have before me the assignments of error, which say, not, that the third and fourth counts do not state a sufficient consideration, but that the declaration, aforesaid does not disclose or set forth any good or sufficient consideration in law for the Plaintiff to have or maintain his action. Upon these grounds I am of opinion, that this rule, which is limited to the amendment of the *postea*, agreeably to notes of Lord *Gifford*, ought to be made absolute.

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The Defendant refusing to allow the judgment roll to be amended by the *postea*, the rule was made absolute without calling on the Plaintiff to refund the costs received on the insufficient counts.

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Nov. 26.

Same Case.

The Court having amended the *postea*, after argument in Error in K.B. amended the judgment roll conformably with the *postea*, after judgment in error entered of record.

VAUGHAN Serjt., after the delivery of the preceding judgment, and the amendment of the *postea*, moved for a rule *nisi* to amend the judgment roll by the *postea*; when it was announced that the Court of King's Bench had that moment pronounced judgment in error, by awarding a *venire de novo*. The Court, nevertheless, granted a rule *nisi*, against which *Laves* and *Wilde* Serjts. now shewed cause. They contended, first, that this Court had no jurisdiction to make the amendment, the record being by intendment of law in the Court of King's Bench, so that no execution could issue on the judgment out of this Court; secondly, that the application came too late after judgment of reversal with an award of *venire de novo* pronounced in error, and entered on record; of which fact they produced an affidavit, and said the record was in court. They relied on *Harrison v. King*. (a)

Vaughan and *Bosanquet* Serjts. in support of the rule. It is sought only to amend the judgment roll, which is still in this Court, not the transcript which is in the court of King's Bench, and the Court would be guilty of a gross inconsistency if it permitted the *postea* and the judgment roll in the same case to contain contradictory allegations. *Wood v. Matthews* (b), and *Frend v. Duke of Richmond* (c), are conclusive to shew that whatever remains in this Court may be amended. And *Pickwood v. Wright* (d), and *Hardy v. Cathcart* (e), shew that

(a) 1 B. & A. 161.

(b) *Popb.* 102.(c) *Hardr.* 505.

(d) 1 H. Bl. 642.

(e) 1 *Marsh.* 180.

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the application is not too late. In *Harrison v. King* it was not made till eight years after judgment.

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BEST C. J. An opinion has prevailed that a writ of error to this Court removes the original record into the King's Bench, but that a writ of error to the King's Bench only removes a transcript of the record of that court into the Exchequer Chamber or House of Lords. This opinion has perplexed me, for I thought that we could not amend a record which had been removed from us into another court. We find from our officers that the original record is not removed, and that a transcript only is carried to the King's Bench.

There is no difference in this respect between the return of a writ of error to the King's Bench, and from the King's Bench. By the 27 *Eliz. c. 8.* the writ of error to the King's Bench commands the Chief Justice of that court to cause the *record* and all things concerning the judgment to be brought before the Justices of the Common Bench and Barons of the Exchequer. The Court of King's Bench does not, as has been supposed, send a *copy* of the record, but the *record*. And the record is so completely gone from the King's Bench, that if the Exchequer Chamber affirms the judgment of the King's Bench, that court would have nothing on which it could award execution.

The court of Exchequer Chamber having no officers to make out writs of execution, or to tax costs, the statute of *Eliz.* has directed that if the judgment of the King's Bench shall be affirmed or reversed, the said record, and all other things concerning the same, shall be removed or brought back into the said Court of King's Bench, "that such further proceedings may be thereupon as well for execution as otherwise, as shall appertain." The same reason that is given by the

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the statute for returning the record into the King's Bench is given by Lord *Rolle* (1st *Roll. Abr.* 753.) for the Chief Justice's carrying back the record of the King's Bench after he has produced it to the House of Lords, and delivered a transcript of it to that house.

The record, that is, that instrument which is to be acted on, is removed by writ of error from both the King's Bench and Common Pleas. But if any doubt arises in the court of error, whether that which they possess is a correct record, that doubt is to be decided by reference to the original record, which remains in the court in which the suit was commenced, and which either the Exchequer Chamber or Court of King's Bench will cause to be brought before them by one or more writs of *certiorari*. We find from *Roll. Abr.* 765, 766, and *Cases Temp. Hardwick*, 118. that after joinder in error, both those courts have awarded a *certiorari*, for the purpose of informing their consciences, and that they might not reverse a judgment on account of *some formal objection*. We have, therefore, the original record, which the Court of King's Bench will inspect, if it be suggested to them that the record which they have is not correct. If that original record be incorrect, and we have something by which we can correct it, surely we ought to do so. Our record is incorrect, for it states the verdict to be taken on all the counts; now, by reference to the *postea*, it will appear that it was only taken on the first count. If we do not make this amendment, the Court of King's Bench must give judgment on a false record, and on the miserable technical objection, that Lord *Mansfield* lamented was a tenable one, namely, that some of the counts to which the attention of this Court was never called, are bad. We are doing what will enable the Court of King's Bench to do justice.

It

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It appears from the authorities in the books, that there are two modes of attaining the object of this rule; one is, by amending the *postea*, certifying to the Court of King's Bench that such amendment is made, and leaving it to them to amend the record; the other, to amend the *postea* and record here; and then it will become the duty of the King's Bench to amend their record by the amended record of this Court. In *Popham*, 102. there are two instances of amendment made from the *postea* by the Court of King's Bench, and one of an amendment made in the same manner by the Exchequer Chamber. In *Dunbar v. Hitchcock* (a) the Court of King's Bench introduced into a record that had been removed into that Court from the Common Pleas, the allowance of double costs certified by the Chief Justice of the Common Pleas. This amendment was made by the King's Bench after the record was removed into the House of Lords, and errors assigned in that House.

Lord *Ellenborough*, in giving judgment, uses these words: "Here the House of Lords have a defective record, diminution has been alleged, and when it has been amended in this respect, *upon being certified unto the House of Lords*, they will direct the transcript to be amended."

Unfortunately this case was not mentioned to the Court of King's Bench, for we have been told, that although that Court were informed from the bar that we had amended the *postea*, they have reversed our judgment, and have been asked if, after this, we will grant this rule. If they have reversed our judgment they have affirmed our opinion, for they have granted, it seems, *a venire de novo*.

It would have been absurd to grant a *venire de novo*

(a) 3 M. & S. 594.

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if the declaration contains in no one count a legal consideration. What the King's Bench has done renders it necessary for us immediately to make this rule absolute to prevent a verdict given by a special jury, approved by the Judge who tried the cause, and by this Court, from being set aside on an objection of mere form.

I have no doubt that the King's Bench will suspend their judgment, but should we be disappointed in this, and the Defendant in error, instead of taking a *venire de novo*, brings a writ of error, it will be our duty to certify to the House of Lords, as the Court of King's Bench did in *Dunbar v. Hitchcock*, that the record sent to that house is a defective record, which will enable the House of Lords to set this matter right.

In *Frend v. The Duke of Richmond*, Lord Hale says, if a record be removed into the King's Bench out of the Common Pleas by writ of error, and afterwards amended by rule of the *Common Pleas*, the Court of King's Bench *must* amend it accordingly."

The word *must* is, without explanation, too strong. We pretend to no power of compelling the Court of King's Bench to do any thing. But every Court must and will do justice, and if through these mistakes, to which all human beings are liable, any Courts fail to do what justice requires, some superior tribunal will prevent the effects of such mistakes. This is, I think, the meaning of Lord Hale.

In making this amendment, after the record is removed by writ of error, we follow the precedents furnished by the Court of King's Bench in *Short v. Coffin*, *Petrie v. Hannay*, and *Dunbar v. Hitchcock*.

PARK J. I am clearly of the same opinion. The case of *Mellish v. Richardson* did not pass as a slight judgment, it was very maturely and deeply considered.

And

And though the verdict stands, or rather was taken on all the counts, and judgment was given in this Court on the whole declaration, it was merely because no counsel drew the attention of the Court to any distinction between them. A writ of error was brought, and we have since altered the postea according to the truth of the facts, because the attention of the Court was never before called to the state of the record. What is the consequence? It is agreed that there are two entries, one on the postea, the other on the judgment roll. Are we to let one stand amended, and the other unamended, with a contradiction on the face of it? It seems the greatest absurdity that can be stated; and when we are to make our own records consistent with each other, we have a right to do that which justice shall require. I am clearly of opinion we ought to do it in this case, and we should be guilty of the grossest injustice and absurdity in leaving the record imperfect.

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BURROUGH J. The question is, in what sense this record has gone from the Court. In a technical sense the record has gone, in point of fact it is here; and the other is a copy of it transmitted to the Court above. What we have already done is confirmed by the cases which we have had cited to day.

The question is, what we are to do now? We cannot do otherwise than pursue the course we did yesterday: it follows as a matter of necessity, we must amend this record. No doubt the Court of King's Bench will suspend their judgment; they will enquire what we have done; they will consider whether it ought to have been done. I have no doubt that they will say the Defendant in error may allege diminution, and they will return the transcript to us in the legal course, for it is an irregular judgment as it stands in their Court. When that is done, they will see that the verdict and judgment stands on the first

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first count only, and if that first count be bad, they will reverse the whole. They probably granted a *venire novo* on the supposition that they could not discover clearly on what counts the verdict might have passed.

GASELKE J. was not in Court.

Rule absolute.

8

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

1826.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Sixth and Seventh Years of the Reign of
GEORGE IV.

ARNOTT v. REDFERN and Another.

Jan. 24.

THE Plaintiff declared in *assumpsit*, on a judgment obtained by him against the Defendants in the High Court of Admiralty in *Scotland*, by which the Judge of that Court "found that by accounts made up by the Plaintiff, there was due to him from the Defendants a balance amounting to 236*l.* 6*s.* sterling, and decerned and ordained the Defendants to make payment to the Plaintiff of the said sum of 236*l.* 6*s.* sterling

1. Where, after the creditor has endeavoured to obtain payment, there has been a wrongful withholding of a debt arising out of a contract which does not carry interest, the jury may allow interest in the shape of damages for the unjust detention of the money.

2. Unless the contrary be shewn, the Court will presume that the decision in a foreign judgment is consonant to the justice of the case.

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cordingly, with interest thereof from the 16th of *March* 1811 till paid; with the sum of 30*l.* 14*s.* 2*d.* sterling, being the modified expences of process found due; and also 1*l.* 10*s.* 1*d.* sterling, being the fees of extracting that decree and stamp." There were also in the declaration the usual money counts, and a count upon an account stated. Plea, general issue. At the trial before *Best C.J.*, *London* sittings after *Trinity* term last, the case was as follows.

The Defendants, wholesale grocers in *London*, wishing to extend their trade to *Scotland*, employed as their agent the Plaintiff, who lived at *Leith*, under the terms of the following letter which was written by him in *London*, and there delivered to them:—

"I have no objections to conduct your concerns in *Scotland*, should you approve thereof, by a few lines confirming the terms below stated: viz.

"I shall make a point of going my journies regularly as the routes left with you, to sell and collect, and remit regularly all money received, upon receiving such; and also will guarantee one-fourth part of such sales, and allow my whole commission to stand over for the purpose of making up any deficiency, if any, so far as the said fourth part of the real loss. This I do upon your paying me one *per cent.* upon the amount of the whole sales made in *Scotland*, or goods sent thereto by your house, and one half *per cent.* more upon said gross amount as a compensation for said one fourth guarantee: all postages and carriage of parcels, &c. to be paid by you. That is, one and a half *per cent.* upon the whole amount for commission and for the guarantee.

"At *London*, 17th *Sept.* 1808."

In 1811 the Defendants discontinued their business in *Scotland* but the Plaintiff's accounts were not finally made up till 1815.

In 1818 he obtained, upon these accounts, in the
 High

High Admiralty Court of *Scotland*, the judgment set out in the declaration.

In 1819 he commenced the present action, which was stayed in consequence of his not complying with a rule of the Defendants, calling on him to give security for costs, he living out of the jurisdiction of the Court.

In 1825 he came to reside in *London*, and proceeded with the action.

The *Scotch* judgment having been put in and proved, it was objected, on the part of the Defendants, that the contract on which the Plaintiff sued was made in *England*; that the *English* law did not allow interest on such a claim as that which had arisen out of this contract, and that the courts here were not concluded by the judgment of the court in *Scotland*.

The jury, then, under the direction of the Chief Justice, found a verdict for the debt, excluding the interest, with liberty for the Plaintiff to move to increase the damages, by adding thereto such sum of money as the Court should direct for interest.

Taddy Serjt. having obtained a rule *nisi* to that effect in *Michaelmas* term last,

Vaughan Serjt., who shewed cause, assuming, first, that the Plaintiff's claim was one upon which the law of *England* did not allow interest, and that the contract having been made in *England* must be regulated by the laws of *England*, *Robinson v. Bland* (a), proceeded to argue, secondly, that the Court might and would, in a case of contract like the present, impugn the judgment of the *Scotch* Admiralty Court, upon any point in which it had decided in a manner at variance with the laws of *England*; in other words, that such judgment gave

(a) 2 *Burr.* 1078.

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the party who sued upon it only a *prima facie* claim, and that it was not conclusive in the courts of this country.

Taddy, in support of his rule, contended, that the judgment, unless unduly or irregularly obtained, was conclusive in the courts of this country. However, as the Court gave no opinion on this point, the argument on it on both sides is now omitted. But *Taddy* also insisted, that the Plaintiff's claim was one on which interest, at least in the shape of damages, might be allowed by the law of *England*. Where a part of the transaction arising out of a contract made in this country, was carried on in a country, the laws of which allowed interest upon debts arising out of such transaction, the law of *England* also allowed interest upon the debt arising on that part of the transaction which was carried on abroad; *Auriol v. Thomas (a)*, *Harvey v. Archbold. (b)* A contract made in *England* might also expressly have reference to performance in another country; and in that case it was governed by the law of the country in which it was to be performed. The interest on a *West India* mortgage might be paid in *London*, and yet *West Indian* interest would be allowed, because the security lay in the *West Indies*; so upon a debt contracted in respect of business performed in *Scotland*, interest might be allowed, according to the law of *Scotland*.

Vaughan. In *Auriol v. Thomas* the contract originated in the *East Indies*, and in *Harvey v. Archbold*, the transaction upon which foreign interest was allowed was directed to and completed at *Gibraltar*.

Cur. adv. vult.

(a) 2 T.R. 32.

(b) 3 B. & C. 626.

BEST C. J. It was assumed at the trial, and also on the motion in Bank, that a Court in *England* could not have allowed a jury to give interest in this case. Taking what was so assumed for granted, we found ourselves embarrassed with two questions of international law, of some difficulty, because not of frequent occurrence; and important, because depending on rules by which justice is to be done to the subjects of other countries.

We thought it therefore right to delay the giving of our judgment until this term, that we might take the opportunity which a vacation afforded us of giving these questions the consideration that they appeared to deserve. We now think that we ought not to have taken it for granted, that if this case had been tried first in *England* instead of the Admiralty Court in *Scotland*, the Plaintiff could not have recovered interest; and that it is not necessary to consider whether this case ought to have been decided according to the law of *England* or *Scotland*, or whether the judgment pronounced by the *Scotch* Court can be impeached here, or must be enforced with qualification or objection.

It has been decided by the highest authority, in the case of *Sinclair v. Fraser*, vol. 20. of *Howell's State Trials*, 469., and *Douglas*, 4., that "Foreign judgments are *prima facie* evidence of a debt, although it is competent to the Defendant to impeach the justice of them, or to shew that they are irregularly or unduly obtained." This is founded on a plain and obvious principle of natural justice. To whatever country a debtor flies, justice requires the courts of that country to compel him, if he can, to pay his debts. It will often be impossible to prove debts in a foreign state by the testimony of witnesses. The only way in which they can be established is by the judgments of the courts of that country in

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which the parties and their witnesses resided when such debts were contracted.

The only objection made to the *Scotch* judgment was, that it gave the Plaintiff interest for a debt due for work and labour, which would not bear interest in *England*. If, under any circumstances, a jury would have been authorized to give interest in the shape of damages for such a debt in *England*, the objection is answered.

We have now looked into the proceedings to see if the circumstances of this case were such as would have allowed damages to be given for interest; we consider the rule to be, that if it could be given in any such case, we must presume, in the absence of any evidence to repel such presumption, that the circumstances of this case entitled the Plaintiff to interest from the day on which the *Scotch* Court has given it. If interest is to be given, then, according to our own rule, it may be calculated up to the time when the payment of the principal may be enforced under the judgment.

We cannot then object to the terms of the *Scotch* judgment, by which it is awarded, that interest is to be paid up to the time when the principal debt shall be discharged.

The original action was to recover a stipulated compensation of one *per cent.* on the amount of certain payments for goods, for the labour of selling those goods and receiving the payments, and for becoming responsible for the solvency of the purchasers, to the extent of one-fourth of the value of the goods sold. The Plaintiff had no opportunity of paying himself out of the money that he received for the Defendants, because he had agreed to remit the whole of what he received to them, and leave his one *per cent.* in their hands, as a security for his paying what might become due to them for goods not paid for by the purchasers. Such a contract does not import that interest should be paid for any money that

that should become due under it. By our law, interest forms no part of the original debt: it is created only by the express terms of a contract, or by implying an engagement to pay interest from the nature of the security, or the usage of the trade to which the contract relates.

This rule wisely prevents acts of kindness from being converted into mercenary bargains, and makes it the interest of tradesmen to press their customers for payment of their debts; and thereby checks the extension of credit, which is often ruinous both to tradesmen and customers.

If it had appeared by evidence that the Plaintiff had taken no steps for so many years to recover his debt, interest could not have been recovered for it in this country; and the question would have arisen, whether we could have carried into execution the judgment of the *Scotch* Court, which gave interest in a case where our law did not allow it. In *Lee v. Munn* (a) this Court held that an auctioneer, who had a deposit in his hands four years, could not be compelled to pay interest, because the Plaintiff had made no demand on him for the re-payment of the deposit. But we have no right to conclude that the Plaintiff quietly permitted the debt due to him to remain in the hands of the Defendant. In many cases it is presumed, that when nothing is proved to have been done, that nothing has been done; but here the judgment is, in the language of the House of Lords, *primâ facie* evidence that every thing was done which was necessary to support it. However a debt is contracted, if it has been *wrongfully withheld* by a Defendant after the Plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money.

In *Eddowes v. Hopkins* and Another (b), Lord Mansfield held, that in cases of long delay under vexatious and

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(a) 8 Taunt. 45.

(b) Doug. 376.

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oppressive circumstances, juries, in their discretion, may allow interest. In *Craven v. Tickell* (a), the Lord Chancellor said, "From conversations I have had with the Judges, interest is given either by the contract or in damages upon every debt detained." From these words, it appears there are two principles on which interest is given in our courts: first, where the intent of the parties that interest should be paid, is to be collected from the terms or nature of the contract; secondly, where the debt has been wrongfully detained from the creditor. Our law would not do what it professes to do, namely, provide a remedy for every act of injustice, if it did not allow damages to be given for interest where a creditor has been kept out of his debt (he using all proper means to recover it) by his debtor. Upon the principle that the debt has been improperly detained, juries are allowed to give interest in actions on judgments. It is immaterial in such actions whether the original debt bear interest or not. In cases where the original debt did not bear interest, there is neither an express nor implied contract enabling the Court to allow interest on an action on the judgment. In *Blackmore v. Fleming* (b), *Lawrence J.* said, if the Defendant would not consent to a reference to the Master to ascertain the amount of interest, in an action on a judgment, the Court would order a writ of inquiry, In *Hillhouse v. Davis* (c), *Abbott* informed the Court that the action in *Blackmore v. Fleming* was for a tailor's bill. In *Hillhouse v. Davis* a verdict for interest was allowed, on the principle that the Defendant had wrongfully withheld the payment of damages found by a jury to be due for an injury occasioned by the making the *Bristol Docks*. *Le Blanc* said, in giving judgment in that case, "The jury having given interest, we cannot set their verdict aside without being satisfied that they have done what they were not warranted to do by law. But there

(a) 1 *Ves.* jun. 60.(b) 7 *T. R.* 446.(c) 1 *M. & S.* 169.

is no positive rule of law against their giving interest on a sum ascertained." *Hillhouse v. Davis* was subsequent to *Calton v. Bragg*. (a) But neither *Hillhouse v. Davis* nor our judgment in this case touch the principle of that decision. *Calton v. Bragg* determined when interest was due by virtue of the contract. The Court in *Hillhouse v. Davis*, and we, now, say, that although it be not due *ex contractu*, a party may be entitled to damages to the amount of interest for any unreasonable delay in the payment of what is due under the contract. We say, in the words of *Le Blanc J.*, that we cannot set the judgment aside without being satisfied that the Court has done what it was not warranted to do. We are therefore of opinion, that as there is nothing to impeach the justice of the *Scotch* judgment, we ought to carry it into complete execution. The rule, therefore, for increasing the damages to the amount of the interest must be made absolute.

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Rule absolute.

(a) 15 *East*, 223.

KNIGHT v. BENETT.

Jan. 24.

REPLEVIN. Avowry, for two years' rent, payable half yearly, and due *March 25th*, 1824. To this the Plaintiff pleaded *non-tenuit*, and *riens en arriere*. There were other avowries for the same amount of rent payable yearly, to which the Plaintiff pleaded *riens en arriere* only, paying into Court a sum which would cover the alleged rent to *Michaelmas* 1823.

Plaintiff entered a farm under an oral agreement for a lease for ten years; though the *time* of paying rent was settled, it did not appear what was the amount to be

At the trial before *Graham B.*, *Sussex* Summer assizes paid; the lease was never executed; but Plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years:

Held, that the lessor might distrain.

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1825, a witness proved that he had arranged the terms of a proposed lease between the Plaintiff and avowant for ten years from *Michaelmas* 1820, as to every thing but the amount of the rent; that he told the Plaintiff the rent was to be paid half yearly, at *Lady-day* and *Michaelmas*; and that in *April* 1821, the Plaintiff, who had entered on the occupation of the farm, had told him he should pay the Defendant half a year's rent in a few days.

No lease was ever drawn up. Another witness proved that the Plaintiff had paid rent to *Michaelmas* 1822, corresponding with the amount specified in the avowry; and that in *April* 1824, he had promised to pay up to the preceding *Lady-day*.

It was objected that the Plaintiff held only under an agreement for a lease, and not under any actual demise, and that there being no stipulation for the payment of a fixed rent, the avowant had no right to distrain.

A verdict, however, was found for the avowant, with leave for the Plaintiff to move to set it aside, and enter a verdict for the Plaintiff.

Wilde Serjt., accordingly, in the last term, obtained a rule *nisi* to this effect, on the authority of *Hegan v. Johnson* (a), and *Hamerton v. Stead*. (b)

Taddy Serjt., who shewed cause, suggested, that as the agreement was invalid under the statute of frauds, the Plaintiff became tenant from year to year, and by the payments he had made, had sufficiently fixed the amount of the rent to entitle the Defendant to distrain; when the Court called on

Wilde to support his rule. He insisted as before, that there was an absence of any express demise or

(a) 2 *Taunt.* 148.(b) 3 *B. & C.* 478.

of any stipulation as to the amount of rent to be paid, both of which were necessary conditions to the validity of a distress on an alleged demise for a sum certain.

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BEST C. J. I am not disposed to question the authority of the cases which have been cited to shew, that the merely entering on premises in expectation of a lease will not constitute such a tenancy as to entitle the lessor to distrain. But these cases do not shew that such a tenancy as would authorise a distress, cannot be created by any other means except a formal lease. Such a tenancy may be implied from circumstances, and the question is, whether in the present case, sufficient circumstances were left to the jury to warrant them in drawing the conclusion they have come to. They were perfectly warranted in finding as they have done. It would be strange if a man could be allowed to occupy land for three years, and after having paid two years' rent and promised to pay what rent had since become due, could be permitted to say, "I have not been a tenant: I have only occupied in expectation of becoming a tenant."

The evidence here is all one way. The witnesses prove that the tenancy was to commence from *Michaelmas*; that rent was to be paid half yearly, and that it had actually been paid for two years, at the rate mentioned in the avowry. The facts of this case are, therefore, distinguishable from those which have been cited, and the verdict of the jury must stand.

PARK J. The length of time, during which the Plaintiff was in possession and paid rent, obviates the difficulty which might have otherwise been occasioned by the omission to execute a lease.

In this view, the cases which have been cited support the avowant's claim. In *Hegan v. Johnson*, the occupation

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pation had only continued for three quarters of a year, and the Court said, "The occupier certainly did not become tenant from year to year at the beginning of the first month, or first three months;" from which, as well as from the language used in *Hamerton v. Stead*, it may be inferred that he would have been esteemed a tenant from year to year, if he had staid beyond the first year.

BURROUGH J. concurred.

GASELEF J. The agreement for a lease for ten years not having been reduced to writing was invalid: but the Plaintiff having entered and occupied for more than a year under the terms of that agreement, it is clear, according to all the cases, that he was tenant from year to year.

Rule discharged.

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By agreement, as well as by custom of the country, a tenant was to have the use of the barns and gate-rooms to thrash out his corn and fodder his cattle till the *May-day* after the expiration of his term; his term expired at *Michaelmas* 1824; he was then restrained by injunction from carrying off the premises corn in the straw: in *January* 1825 his landlord distrained a rick of corn on the premises: Held, that the distress was valid.

THIS was another replevin between the same parties, upon a distress of a rick of corn standing in a field. The avowry was for half a year's rent alleged to be due at *Michaelmas* 1824, upon the same demise as in the preceding case. The Plaintiff pleaded *non tenuit*.

Upon the trial it appeared that the Plaintiff had, under a notice to quit, ceased at *Michaelmas* 1824 to occupy the premises in respect of which the distress was

made:

made: that by an injunction out of Chancery he had been restrained from carrying off the premises corn in the straw; but that by the conditions under which he had occupied, as well as by the custom of the country, he was to have the use of the barns and gate-room, &c. to thrash out his corn and fodder his cattle, till the *May-day* after the expiration of his term. The distress was made in *January 1825*.

A verdict was found for the avowant, with liberty for the Plaintiff to move to set it aside and enter a verdict for the Plaintiff, on the ground that the Plaintiff's interest in the premises having determined, and he having ceased to occupy them, a distress could not be made under the statute of 8 *Ann. c. 14*.

Wilde Serjt. having obtained a rule *nisi* accordingly, the Court stopped *Taddy Serjt.*, who was to have shewn cause, and called on

Wilde to support his rule. The Plaintiff's interest in the premises determined at *Michaelmas 1824*. The custom of the country prevails only for the benefit of the occupier, to enable him to carry off the crops he may have raised; and if he does not claim the benefit of the custom, he cannot be liable to the burthens it may impose. The Plaintiff disclaimed any intention to occupy beyond the expiration of his term; and his corn was detained on the premises against his will by the party who afterwards distrained it. If he had left the corn voluntarily, it might have been liable to distress by virtue of the custom, but the avowant ought not to be allowed first to detain, and then to distrain the corn. The statute 8 *Ann. c. 14*. only applies where the tenant continues in possession; but the Plaintiff had quitted the premises long before the distress.

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BEST C. J. The express contract between these parties is for a holding from *Michaelmas* to *Michaelmas*, but there is an implied contract under the custom of the country, that the tenant shall continue possession for the purpose of thrashing and foddering, up to the *May-day* ensuing; and the question is, whether the landlord could distrain between *Michaelmas* and *May-day* for the rent due at *Michaelmas*. The statute of *Anne* does not apply to the point, because that statute gives a right to distrain for six months after the determination of the lease, where the interest of the landlord and the possession of the tenant continues.

But in the present case the interest under the lease was not determined; and the case of *Bevan v. Delahay* (a) decides the question. It was holden in that case that a custom for a tenant to leave his away-going crop in the barns of the farm for a certain time after the lease is expired, and he has quitted the premises, is good, and the landlord may distrain the corn so left after six months have expired from the determination of the term. Lord *Loughborough* said, "It has often been determined that if there be a lease, and after the determination of it the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants of the lease; and it is not material whether the interest and connection between the landlord and tenant be extended by such holding over, or by the operation of a custom."

PARK J. This case is one of a continuing tenancy, and *Bevan v. Delahay* is conclusive on the point under consideration. That decision was confirmed in *Boraston v. Green* (b), where *Bayley J.* considered such a custom

(a) 1 H. Bl. 5.

(b) 16 East, 71.

a prolongation of the term during which the landlord might distrain for the off-going rent. The statute of *Anne* does not apply, because the term is continued by the custom of the country.

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BURROUGH J. In corn countries the custom of the country arises out of the necessity of the thing, for without such a custom the tenant could not get in his corn in late harvests. But as he is bound to thrash it out on the land, the custom of the country enures as much to the benefit of the landlord as of the tenant. The tenant by taking away his corn could not put an end to the contract under which he was bound to thrash it on the premises; and the tenancy continuing by the necessary custom of the country, the object of the injunction was only to compel him to do what he was bound to do under his contract. I have no doubt that the tenancy continued, and that the landlord had a right to distrain independently of the statute of *Anne*.

GASELEE J. The question is, what was the expiration of the tenant's term, and the case of *Wiglesworth v. Dallison* (a) clearly shews that the expiration may depend on the custom of the country.

Rule discharged.

(a) *Doug.* 201.

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Jan. 25.

CROWDER v. AUSTIN.

The vendor of a horse stationed his servant to join in the bidding at a public auction, and the servant bid up to 23*l.* after a *bonâ fide* bidder had bid 12*l.* :

Held, that the sale could not be enforced against a subsequent bidder.

THE Plaintiff sought to recover the price of a horse sold by him to the Defendant at a public auction; one condition of which auction was, that the horse should be sold to the best bidder. The Defendant, himself a horse dealer, resisted completing the contract, on the ground that after a *bonâ fide* bidder had bid 12*l.* a servant of the Plaintiff's, stationed by him at the auction, made repeated biddings up to 23*l.*

At the trial before *Best. C. J.*, *London* sittings after *Michaelmas* term, the Plaintiff having been nonsuited upon proof of these facts,

Wilde Serjt. now moved for a rule *nisi* to set aside this nonsuit. He argued, that the decisions in which it had been holden that a contract of sale might be avoided upon proof that the seller had resorted to puffing, turned upon a presumption that a fraud had been practised upon the purchaser, *Howard v. Castle.* (a) But since those decisions, puffing, or at all events, bidding with a view to buy in, had become so much the recognized practice of auctions, that it was impossible to say that any purchaser could be deceived by it, much less such a purchaser as the Defendant, himself a horse-dealer, and conversant with every mode of disposing of horses.

The practice of bidding for the purpose of buying in, is recognized by the legislature, which has provided for the remission of the duty: [*Best C. J.* but

(a) 6 T. R. 642.

notice ought to be given of the intention to buy in.] And the Lord Chancellor has sanctioned it in sales under the authority of the Court of Chancery. *Conolly v. Parsons*. (a) Whether the buyer has notice from the seller, or from the notoriety of the general usage, is indifferent. The language of Lord *Mansfield*, in *Bexwell v. Christie* (b), applies to a period when the practice was not so notorious as at present.

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BEST C. J. I am of the same opinion as I was at the trial, where I thought the whole transaction was a fraud on the Defendant; but as the question is of importance, it may not be improper to grant a rule *nisi*.

PARK and BURROUGH Js., thought a rule ought not to be granted, expressing their entire concurrence in the opinion expressed by Lord *Mansfield*.

GASELEE J. thought Lord *Mansfield's* decision satisfactory, but as it had once been objected to, was willing that a rule *nisi* should be granted.

A rule *nisi* was granted accordingly; but

Wilde Serjt. on a subsequent day finding the Court still of the same opinion, said he was instructed by his client to carry the case no further. By his own consent, therefore, the rule was

Discharged.

(a) 3 Ves. jun. 625

(b) Cowp. 395.

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DOE dem. SPENCER v. CLARK.

This Court will not stay the proceedings in an action brought by the provisional assignee of the insolvent debtors' court, on an objection that it was not proved at the trial of the cause that the assignee had, pursuant to 1 G. 4. c. 119. s. 11., the authority of the insolvent debtors' court to proceed.

A VERDICT was recovered for the Plaintiff in this ejectment, on the demise of the provisional assignee of the Insolvent Debtors' Court. At the trial, the lessor of the Plaintiff did not shew that he was authorized by that court, and by the major part in value of the creditors of the insolvent, to bring the action; and upon this ground, a rule *nisi*, to set aside the verdict, having been discharged (a),

Wilde Serjt., after referring to 1 G. 4. c. 119. s. 11. (by which it is enacted, with respect to actions by assignees of an insolvent debtor, "That no suit in law be proceeded in further than an arrest on mesne process," "without the consent of the major part in value of the creditors of the prisoner," "and without the approbation of one of the commissioners of the said court,") obtained a rule *nisi* for staying proceedings.

Larves Serjt., who shewed cause, objected that the application was too late after verdict, and he referred to *Leigh v. Kent* (b), in which the Court refused after verdict to stay proceedings in debt on a penal statute, though no affidavit had been filed pursuant to 21 Jac. 1. c. 4. that the offence was committed in the county where the action was brought, and within a year before the bringing of it. The application, too, ought to have been made to the Insolvent Debtors' Court.

(a) See 3 *Bingh.* 203.(b) 3 *T. R.* 362.*Wilde.*

Wilde. The Insolvent Debtors' Court could not stay the proceedings of a superior court. The statute of 1 G. 4. c. 119. s. 11. and 3 G. 4. c. 123. s. 2. are express, that the assignee shall not proceed after mesne process without the sanction of that Court; and in the present case, he might have applied for and have obtained that sanction, if the Insolvent Debtors' Court had been willing to afford it, in the interval between the discharge of the rule for setting aside the verdict and the present application.

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BEST C. J. This application to the Court depends on the eleventh section of 1 G. 4. c. 119., by which it is enacted, "That no action in law be proceeded in further than an arrest on mesne process," "without the consent of the major part in value of the creditors of the prisoner," "and without the approbation of one of the commissioners of the said court;"

And on the second section of 3 G. 4. c. 123., by which it is enacted, "That it shall be lawful for the provisional assignee to sue in his own name, if the said court shall so order, for the recovery, obtaining, and enforcing of any estate, debts, effects, or rights of any such prisoner."

We have already decided, that it was not inquirable at the trial of this cause, whether or not the provisional assignee sued with the authority of the Insolvent Debtors' Court. It was not the object of the legislature to provide a defence to such as did not pay what they owed to an insolvent estate, or wrongfully kept possession of any property belonging to such estate. The Defendant could not be permitted to raise this objection either in this court or the Court for the Relief of Insolvent

(a) 3 B. & A. 697.

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Debtors. I do not mean to say that this Court might not, on the application of a *creditor* of an insolvent, stay an action that was brought by the provisional assignee of the Insolvent Debtors' Court without the consent of the major part in value of the creditors and the approbation of one of the commissioners of the Insolvent Debtors' Court. But it must be a very extraordinary case in which we should interfere; the intent of the legislature in introducing these clauses into the acts being only to prevent insolvents' estates from being wasted in useless litigation. We should say go to the Insolvent Debtors' Court, who have better means of knowing than we can have, whether the suit instituted is likely to be beneficial to the creditors or not. It has been said that the Insolvent Debtors' Court cannot stay the proceedings in an action in this court, but they can order the provisional assignee, who is their own officer, not to go on with the cause; and if he disobeys their order (which is not very likely) they can punish or dismiss him. The Chancellor cannot prevent a court of common law from proceeding in an action, but he may commit the party and his attorney to the *Fleet* who moves a court of common law to proceed after service of an injunction. We do not stop a cause on equitable grounds of defence, but leave a Defendant to his remedy in a court of equity. In cases of bankruptcy the assignees are not entitled to commence a suit in equity without the consent of the creditors at large; but if they do so, the practice is not to stay the proceedings, but to restrain the assignees for the future.

PARK and BURROUGH Js. concurred.

GASELEE J. The legal estate in the insolvent's property has been conveyed to the provisional assignee,
and

and the Defendant has no right to withhold from the creditors what belonged to the insolvent. In *Ex parte Whitchurch (a)*, though the Court reprobated the assignee of a bankrupt for suing without authority, they did not stay the proceedings, but only restrained the assignee for the future. The Insolvent Debtors' Court is more likely to interfere with effect than we, where any of its assignees have misconducted themselves, and to that Court the present application ought to have been made.

Rule discharged.

(a) 1 Atk. 210.

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THIS being the day appointed for the trial at bar of a writ of right between the above parties, the grand assize was called, when only three of the knights appeared, and the sheriff returned, that Sir *George Alderson*, the fourth knight, was too ill to attend either in this or the ensuing term.

There was also an affidavit from a medical man, that it was improbable Sir *George* would ever be sufficiently recovered to attend; upon which,

Bosanquet Serjt. moved, that the process issued for choosing and summoning the grand assize should be taken off the roll, and a new *venire*, with an entry of continuances, be issued, for summoning four knights to choose the grand assize, or

That a suggestion should be entered of the inability of Sir *George Alderson* to attend, by reason of sickness

Where, upon the day appointed for the trial of a writ of right, only three of the knights appeared, and the sheriff returned, that the fourth was too ill to appear in that or the ensuing term, which return was confirmed by the affidavit of a medical man, the Court granted a summons for another knight.

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and infirmity; that he should be discharged from his attendance, and that a summons should issue for another knight, with a distringas to compel the future attendance of the three who were present.

In support of this motion he referred to a dictum in *Lord Windsor v. St. John (a)*, confirmed by 22 *Ed. 3.* fol. 18., from which it appeared that a rule in the latter alternative had been granted where one of the knights had died; and he cited *Rex v. Cowle (b)*, in which Lord *Mansfield* had said, the law was clear and uniform under which the Court had exercised a jurisdiction over its own process.

Vaughan and *Wilde* Serjts. opposed the motion, on the ground that it was discretionary with the Court whether they should comply with or discharge such an application, and that the discretion of the Court had never been exercised to assist a writ of right, which was deemed a vexatious suit. In *Adams v. Radway (c)* they had refused to quash a writ of summons in a similar proceeding; and as to the case in the *Year Books*, there was a great difference between death and a temporary infirmity, which was too uncertain a ground for such an application as the present; besides, that case was not, as the present, advanced to a stage beyond that in which the knights had made their election.

BEST C. J. Rights to easements are perfected by twenty years enjoyment, and lost by nonuser for the same period of time. There is no reason why one who is under no disability to assert his claim, should be allowed sixty years to bring a writ of right, although an ejectment, which is the most convenient mode of deciding a

(a) *Dyer*, 98.(b) 2 *Burr.* 859.(c) 1 *Marsb.* 602.

right

right to real property, cannot be brought after twenty years from the commencement of the Plaintiff's title. Whilst the title to lands remains in doubt, all improvements are suspended. The public interest, as well as that of the possessors', require that titles should be rendered indefeasible as soon as those who may be supposed to have claims on estates have had a fair opportunity of establishing them. I much wish that the legislature would shorten the time allowed for bringing writs of right, render the proceedings under them less complicated and dilatory, and give the party who succeeds his reasonable costs. But whilst the law allows such writs to be brought at any time within sixty years from the accruing of the title, judges cannot assent to the argument, that all such writs are vexatious, and that the courts should take advantage of any accident to prevent the demandant's proceeding. Judges have no authority to defeat a legal right, because they think it ought not to be insisted on. If a law be inconvenient or unwise, I am not for defeating it by indirect means. Let the full force of its inconvenience be felt, and then the legislature will alter it in a proper manner. This Court has certainly refused to allow an irregularity in the proceedings on a writ of right occasioned by the negligence or mistake of a party to be cured by amendment, although they would permit a similar defect to be amended in any other species of action. But there is a difference between a difficulty arising from the blunder of a party, and one that is occasioned by the act of God. It is one of our maxims, that "*actus Dei nemini facit injuriam.*" The demandant in this case is prevented from proceeding by the illness of one of the knights; and it is proved by affidavit and returned by the sheriff, that it is highly improbable that this knight's health will ever be so much improved as to allow him to attend the trial of this cause. We cannot

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postpone the trial in the hope of Sir *George Alderson's* recovery, and why are we to wait for his death before we summon another knight to fill the place, which he is as incapable of filling as if he were dead. A little common sense is sufficient without any authority to direct us in so plain a case. Two modes of relieving the demandant have been pointed out to us by the law; one, that the process issued for choosing and summoning the grand assize should be taken off the roll, a new *venire* be issued for summoning four knights to choose the grand assize, and the entry of proper continuances be made: the other, that a suggestion should be entered that one of the knights is disabled by sickness, which appears likely to be permanent, from attending the trial, and that he has been on this account discharged from further attendance; that a summons should issue to another knight to supply the place of the knight incapable of attending, and a *distringas* to compel the attendance of the knights now present at the day of trial. I prefer the latter mode, first, because nothing is done more than the necessity that has arisen requires. There is no occasion to summon four knights when three are already summoned, nor to choose a grand assize when one is already chosen. Secondly, if what I think so reasonable should be thought by others unreasonable, or that which is reasonable not legal; if the latter mode be pursued, what has been done will appear on the record, and the tenant may question the propriety of it by writ of error. In the case in *Burrow* referred to in the argument, Lord *Mansfield* says, that every court has authority to controul its own process. There is no exception to this general rule; this rule is essential to the due administration of justice in the case of a writ of right. In Lord *Windsor v. St. John*, one of the judges said, that when one of the knights was dead, it was the practice to do what is desired to be done in this case.

What is fit to be done in the case of the death of a knight, is equally fit when one of them is prevented by a permanent illness from attending the trial. I think, therefore, a suggestion should be entered, and a new venire and distringas issued as prayed by the counsel for the demandant.

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PARK J. It is true, that the books furnish us with no case in which the Court has been applied to, to supply the absence of a knight who has been prevented by sickness from attending in his place; but the principle is the same where the attendance has been prevented by death.

We have here a sufficient reason on record for the discharge of Sir *George Alderson*, and when there is a complete assize except as regards him, why should not a new venire issue for another knight? *Adams v. Radway* does not apply on the present occasion, because the party in that case had proceeded irregularly; but the act of God cannot work injustice, and we must therefore issue a venire facias for another knight.

BURROUGH J. As long as writs of right are allowed by law, we must act upon them. Where, indeed, the parties have been irregular, the courts have not shewn any indulgence, because the proceeding is a late one, but in cases of the act of God there is no instance of the courts refusing assistance.

GASELEE J. It is no indulgence to accede to this motion in the second alternative. If a party is entitled to have his cause tried, the Court must not interpose unnecessary obstacles, and there can be no error in stating on the record, the reason why the cause has not proceeded now. It appears to the Court that there is no probability of the attendance of Sir *George Alderson*,
 and

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and the defect must be supplied by commanding another knight to come in his stead. A day must be given until three weeks after *Easter*, and the rule for a *venire* to summon another knight must be made

Absolute.

Jan. 28.

SCAMON and Others v. MAW.

A feme covert, entitled to a copyhold, surrendered it after secret examination by the steward, to the use of her husband with his assent, testified by his immediate admittance : Held, that this surrender was valid.

THE following case was sent for the opinion of this Court from the Vice-Chancellor :

Mary Bullen, the wife of *Philip Bullen*, was entitled to a certain copyhold tenement, consisting of a messuage with the outbuildings, and fifty-six acres of land, within and parcel of the manor of *Greetham*, in the county of *Lincoln*.

At a court baron and customary court, holden in and for the said manor on the 10th *December* 1795, by the steward of the said manor, the said *Mary Bullen* was duly admitted to the said tenement, to hold to her and her heirs at the will of the lord, according to the custom of the said manor, by the accustomed rent and services ; and immediately afterwards, at the same court, the said *Mary Bullen*, being first solely and secretly examined by the said steward, did surrender into the hands of the lord of the said manor, by the acceptance of the said steward, the said tenement to the use of the said *Philip Bullen*, his heirs and assigns for ever. To which said *Philip Bullen*, then personally present in full court, the lord of the said manor, by his steward, did grant thereof seisin by the rod, according to the custom of the said manor, to have and to hold the said tenement and premises unto him, the said *Philip Bullen*, his heirs and

assigns for ever, at the will of the lord, according to the custom of the said manor, by the accustomed rents and services; and the said *Philip* thereupon paid the fine payable for such admittance, and did fealty, and was admitted accordingly.

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There is no special custom in the manor of *Greetham* as to the surrender of copyhold estates belonging to *femes covert*.

The question for the opinion of the Court was, whether the aforesaid surrender made by the said *Mary Bullen*, to the use of her husband, the said *Philip Bullen*, was a valid surrender of the said copyhold tenement to the use of the said *Philip Bullen*, his heirs and assigns.

Wilde Serjt. The surrender was valid. It is clear that the husband and wife together might, without the aid of a custom, make a valid surrender. But the assent of the husband is equivalent to his joining in the surrender; and his assent appears by his being admitted at the same court at which the surrender was made; by his taking under the surrender, and paying the fine. There is no reason for joining him in the surrender, except to express his assent. The entire interest in the property is in the wife; he can neither convey nor forfeit the estate. The wife is admitted notwithstanding her coverture, and she alone does fealty. In *Compton v. Colinson (a)*, the wife surrendered without her husband, and the Court thought it sufficient if his assent appeared. And if she may convey alone by fine, there seems to be no reason why she should not convey by surrender.

Bosanquet Serjt. contra. It has been holden, that under a special custom, a *feme covert* may surrender

(a) 1 H. Bl. 334.

alone,

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alone, with the assent of her husband. But it seems to follow, if this be law, that she cannot do so without a custom, and no custom is stated in the present case. A custom to convey without the assent of the husband has been holden bad; *Stephens dem. Wise v. Tyrrel (a)*; and the case of a fine is very distinguishable from the present, because the female is separately examined in court. *Taylor v. Philips (b)*, however, is in point, to shew that the surrender by the wife alone is insufficient; and *Compton v. Collinson (c)*, which has been overruled, was decided on the ground that the feme covert, upon whose acts the question arose, was virtually a feme sole, there being a suspension of the marital rights. But according to the present opinion of the Courts, marital rights cannot be suspended. *Marshall v. Rutton. (d)*

Cur. adv. vult.

Having heard this case argued by counsel, and considered it, we are of opinion that the surrender made by the said *Mary Bullen* to the use of her husband, the said *Philip Bullen*, having been made in his presence and with his assent, testified by his immediate admittance under it, and she having been first solely and secretly examined by the steward, was a valid surrender of the said copyhold tenement to the use of the said *Phillp Bullen*, his heirs and assigns.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELKE.

(a) 2 *Wils.* 1.

(b) 1 *Ves.* sen. 229.

(c) See 2 *Br. C. G.* 377. note. *Eden's* edition.

(d) 8 *T. R.* 545.

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(IN THE EXCHEQUER CHAMBER.)

POWELL and Others v. SONNETT and Others.

Jan. 28.

ASSUMPSIT. The declaration contained twenty counts, twelve of which were special.

The Defendant below pleaded the general issue to all the twenty counts, and the statute of limitations, and a set off to the last eight counts.

The Plaintiffs below replied to the plea of the statute, that they were beyond seas; and to the plea of set off, *nil debent*.

The Defendants below rejoined that the Plaintiffs below were not beyond seas, and issue was joined on that and the rest of the pleadings.

The jury found for the Plaintiffs below, damages 24,000*l.* on the twelve special counts, for the Defendants below upon the remaining eight, for the Plaintiffs below on the issue *ultra mare*, and on the issue on the set off, the jury were discharged.

The Defendants below brought error into this Court, assigning as a ground, that it was not stated on the record that the jury had been discharged on the issue arising out of the plea of set off to the last eight counts, with the consent of the parties.

Patteson, for the Plaintiffs in error, argued that the jury could not be discharged by the authority of the Judge; that the consent of the parties was material; and that it was equally material that such consent should appear on record; though he could not find any old

entry

The record stated a verdict for Plaintiffs on twelve counts, and that the jury were discharged on eight others.

The issues on these latter counts being immaterial, the Court refused to reverse, on error, the judgment for Plaintiff, on the ground that the discharge of the jury was not stated on the record to be with the consent of the parties.

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entry in which there was any mention of the jury having been discharged.

Brodrick for the Defendants in error contended, that the eight issues on the set off applying to the same causes of action as those on which the verdict had been found for the Defendants in error on the general issue, those eight issues became immaterial, and that upon an immaterial issue the jury were discharged by operation of law; for which he relied on *Cossy v. Diggons* (a), and refused to amend the record, which the Court offered to allow him to do.

BEST C. J. The Court entertains no difficulty, but the sum at stake being large, they were anxious, by allowing an amendment, to take away all pretence for carrying the cause further. As it does not appear on record that there was any bill of exceptions, or motion for a new trial, or in arrest of judgment, we must presume that all which is stated on the record to have been done was rightly done, and the judgment of the Court below must be

Affirmed.

(a) 2 B. & A. 546.

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DOUGAL v. KEMBLE and Another.

Feb. 3.

THIS was an action of *assumpsit*, to recover the freight and primage of some sugars conveyed by the Plaintiff from the *West Indies* to *London*.

At the trial before *Best C. J.*, *London* sittings after *Trinity* term last, a verdict was found for the Plaintiff for 200*l.* damages, subject to the opinion of the Court on the following case:

The brig *Pursuit*, whereof the Plaintiff was the owner, took in a cargo of sugars at the island of *St. Lucia*, and arrived with the same in the *West India* Docks, where the cargo was afterwards landed and warehoused. Sundry hogsheads of sugar forming part of the cargo were marked C. L.; others, F. D.; others, M. D. Bills of lading were signed by the captain of the ship for the sugar in question, by two of which, the portion of sugar marked F. D. and M. D. was made deliverable to the shipper's orders, or to assigns, he or they paying freight for the same, with primage and average accustomed. By the third, the sugars marked C. L. were made deliverable to *J. R. Le Cointe* and Co., or to assigns, he or they paying freight for the same, with primage and average accustomed.

The bill for the sugars marked F. D. was indorsed, "Deliver the within hds. of sugar to Messrs. *Le Cointe* and Co., provided they accept my draft of this day's date in favour of Messrs. *D. Ferguson* and Co. for 200*l.* sterling, at ninety days sight, otherwise to the holder of the said draft, 18th *September*, 1824." (Signed *Salvigny*.)

Goods were consigned to *L. G.* and Co. or their assigns, "he or they paying freight for the same." *L. G.* and Co. indorsed the bill of lading to *K.*, their broker, and then became bankrupt; the ship-owner, in ignorance of these circumstances, applied to *L. G.* and Co. for the freight, and then sued *K.* for it: Held, that *K.* was liable.

The

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The bill of exchange referred to by the bills of lading was duly accepted by *Le Cointe* and Co. previously to the bills of lading being handed to them.

The sugars marked F. D. and M. D. were entered on the 9th of *November* 1824, by the owner of the ship at the Custom-house, to be warehoused in pursuance of the statute of 4 G. 4. c. 24.

On the same day, the captain, on the part of the owner of the ship, gave notice to the directors of the *West India Docks Company* to stop the sugars F. D. and M. D. till the freight was paid.

The sugars marked C. L. deliverable by the bills of lading to *Le Cointe* and Co. were not then stopped as the others.

On the 25th of *November*, and 10th and 13th of *December* respectively, the Defendants presented at the *West India Docks* office, the three bills of lading before mentioned, the one of which for the sugars marked C. L. had been previously indorsed and delivered by *Le Cointe* and Co. to the Defendants; and the two bills of lading for the sugars, marked F. D. and M. D. had been indorsed by the shippers to *Le Cointe* and Co., and had also been indorsed and delivered by *Le Cointe* and Co. to the Defendants: and under and by virtue of the bills of lading and indorsements thereon, the Defendants obtained the transfer of the sugars into their names in the warehouse and books of the Dock Company.

On the 16th of *November* the Defendant's clerk applied to Messrs. *Robertson* and Co., who were brokers for the ship, on account of the Plaintiff, and requested that the stop which had been put upon the sugars in pursuance of the captain's notice before mentioned, might be taken off from the sugars marked
 F. D.

F. D. and M. D., and that the said sugars might be delivered out of the docks; and Messrs. *Robertson* and Co. thereupon signed an order, addressed to the collector of the *West India* Dock Company, withdrawing the stop, and desiring that the goods in question might be delivered to *Le Cointe* and Co., the consignee thereof, or their assigns.

This order was brought by the Defendants' clerk to the dock collector.

On the 16th *December* *Le Cointe* and Co. suspended their payments, on the 1st *January* 1826 committed acts of bankruptcy, and on the 5th *January* a commission of bankruptcy was issued against them, which was inserted in the *Gazette* of the 8th *January*.

The Plaintiff's brokers, who collected the freight for the ship, on account of the Plaintiff, on or about the 4th *January*, in the usual course, sent an account of the freight note to Messrs. *Le Cointe* and Co., charging them as debtors for the same. *Up to and at this time the brokers did not know that the bills of lading had been endorsed by Le Cointe and Co. to the Defendants, or that Le Cointe and Co. had suspended their payments, or had committed any acts of bankruptcy.*

On the 8th *January* the Plaintiff's brokers applied at *Le Cointe's* and Co. for payment of the freight, and were then first informed of their having suspended their payments.

And the Plaintiff's brokers, on the same 8th *January*, first learnt by enquiring at the *West India* Dock-office, that the bills of lading had been indorsed to the Defendants; the brokers thereupon applied for and obtained back the freight note from *Le Cointe* and Co., and on the 8th day of *January* delivered a freight note to the Defendants, charging them as debtors for the same.

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shipper; and in those cases the Courts have holden the receiver of the goods liable; that was the ground of the decision in *Cock v. Taylor*; but the Court said, in *Wilson v. Kymer (a)*, which is in point for the present Defendant, that they would not go beyond that case. In *Wilson v. Kymer* the Defendants were at first holden not liable; and though the ultimate decision was different, yet that turned on the ground of previous dealing between the parties. In *Cock v. Taylor* the Defendants were purchasers of the bill of lading; in the present case the Defendants are not purchasers of the bill of lading, nor do they receive the goods under it, but by virtue of the order of *Robertsons*, as the agents of *Le Cointe and Co.* In *Moorsom v. Kymer (b)*, where ship-owners were to be paid for the hire of a ship under the terms of a charter-party, and the bill of lading was to deliver the goods to the charterers or their assigns, he or they paying freight as *per* charter-party, it was holden that the indorsees of the bill of lading were not liable to the ship-owner upon an implied *assumpsit* arising out of the receipt of the goods under the bill of lading. And though in *Bell v. Kymer* they were holden liable to the *charterer*, that decision turned upon the particular conduct of the indorsers.

The liability of consignees rests on the custom of trade, *Roberts v. Holt (c)*, which does not extend to indorsees. The credit here was certainly given by the ship-owner to *Le Cointe and Co.*: he applied to them first for payment; if he had sued them, it would have been no defence for them to have said that the bill of lading had been handed over to *Kemble and Co.*; and if *Le Cointe and Co.* are liable, *Kemble and Co.* are discharged. They only act as brokers, and it will be a great hardship if they are held liable. At all events, a

(a) 1 M. & S. 157. (b) 2 M. & S. 303. (c) *Stow*, 443.

count on general assumpsit for freight is not sufficient as to those goods for which the freight was to be paid by the acceptance of a bill at ninety-days sight. That was a special engagement, and ought to have been described in a special count.

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BEST C. J. It being clear that justice will be done by allowing the verdict for the Plaintiff to stand, the Court has only to see that its judgment is not inconsistent with previous decisions. It has been insisted, on the part of the Defendants, that the verdict for the Plaintiff is inconsistent with the law of *England*, because the contract on the bill of lading is with the shipper or *Le Cointe* and Co., and that the liability of these parties cannot be transferred to the Defendants. But this argument is founded on an inaccurate statement of the terms of the bills of lading. Neither the shipper nor *Le Cointe* and Co. agree by these instruments to pay the freight. These are receipts for the goods, with an undertaking on the part of the captain that he will deliver them to the legal holder of these bills, on such holder's paying the freight. The captain has a lien for the freight against whoever shall become the owner of the goods. The owner could not compel the captain to deliver the goods from his actual possession without paying the freight. The act for regulating the *West India Docks* continues the lien for freight whilst goods delivered from a ship, and liable to freight, remain in those docks. Whoever obtains the delivery of goods under such a bill of lading, contracts, by implication, to pay the freight due on them. There is no assignment of contract, no shifting of liability. The receiver of the goods is an original contractor to pay the freight of them. With respect to the alleged hardship on brokers, they know the terms of the bill under which they claim, they know what freight is due, and they need not make

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advances beyond the value of the goods subject to freight; the hardship on the ship-owner would be much greater if, after having brought the goods to *England*, he should not be entitled to recover freight from the parties who possess them under the bill of lading. *Cock v. Taylor* is expressly in point for the Plaintiff. It has been attempted to distinguish that case from the present by the circumstance, that the Plaintiff in that case had made no application to the consignee before applying to the Defendant, and that the Defendant was there a purchaser of the bill of lading. With respect to the application to the consignees, it was made when the Plaintiff supposed them to be the holders of the bills of lading; the moment the Plaintiff discovered that the bills of lading had been transferred to the Defendants, he applied also to them; and a man is not bound by what he does in ignorance of the actual circumstances of his case. As to the circumstance of the Defendant in *Cock v. Taylor* being a purchaser of the bill of lading, the effect of that is got rid of by *Bell v. Kymer*, in which the Defendant was only a broker, and in which *Gibbs C.J.* said, "the holders of a bill of lading were bound to know that they were liable for the freight." That decision is not touched by any subsequent case, for *Wilson v. Kymer* turned on a different point; and every Judge in that case confirmed the decision in *Cock v. Taylor*. In *Wilson v. Kymer* the Defendants did not obtain the goods under the bill of lading, but under the order of the consignees. In *Moorsom v. Kymer* the inference of an implied contract was repelled by the existence of a special contract under a charter party; and *Le Blanc J.* said, "The law will not raise an implied promise where there is an express agreement between the parties." But he also said, "Where the ship is a general ship, and there is no other to whom the party can resort, the law will imply a promise to prevent a failure of justice."

There

There would be a failure of justice if such a promise were not implied in the present instance.

With respect to the declaration, the contract having been executed, the Plaintiff is entitled to recover on the general count for freight, which was the form of the declaration in *Cock v. Taylor*.

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PARK J. The arguments which have been urged on the part of the Defendants to-day, were pressed in many of the prior cases, but in vain; and the authority of *Cock v. Taylor* has remained unimpeachable.

Wilson v. Kymer and *Moorsom v. Kymer* are plainly distinguishable on the ground stated by my Lord Chief Justice. And in *Bell v. Kymer*, which was decided by Gibbs J., a man most eminent for his knowledge of commercial law, the Defendants were brokers, and the decision in *Cock v. Taylor* was confirmed.

BURROUGH J. I agree as to the justice of this case, and that we are now bound by the decision in *Cock v. Taylor*, although if I had been a Judge of the Court of King's Bench when that case was argued, I am doubtful whether I should have concurred in the decision.

With respect to the declaration, I think that a general count for freight is not sufficient between these parties. It might have been sufficient between the ship-owner and the consignees after the contract was executed, but when the ship-owner parts with the goods, he relies on the undertaking of the party to whom the goods are delivered; and as against him the declaration should be framed specially on the undertaking, and not on the common liability to pay freight, which seems to attach only on the shipper or consignee.

GASELEE J. It is not material now to decide whether an action like this against the indorsees of a bill of

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lading, ought originally to have been sustained on a general count for freight; such a count has been sustained in *Cock v. Taylor*, and that decision has never been overruled. I concur, therefore, with the rest of the Court that there must be

Judgment for the Plaintiff

Feb. 3.

BUTTERY v. ROBINSON.

Devise of lands to *A.* for life, remainder to *B.* in fee, subject to and charged with the payment of 20*l.* a year to *C. D.* during her life, to be paid by *A.* as long as she should live, and after her decease to be paid by *B.*
 Held, a charge on the land, for which *C. D.* might distrain.

REPLEVIN. The Defendant avowed for the arrears of a rent charge which he claimed under a will by which one *Mathew Robinson* devised the premises in which, &c. to his wife for life, remainder to his sons in fee, "but subject nevertheless to and charged and chargeable with the payment of the yearly rent or sum of twenty pounds, thereby then and there devised and given by the said *Mathew Robinson* to the said Defendant and her assigns during the term of her natural life, to be paid by his the said testator's said wife so long as she should live, and after her decease to be paid by his said sons equally between them, by four equal quarterly payments, the first payment thereof to begin and be made at the end of three calendar months next after his the said testator's decease."

Plea. That the said *Mathew Robinson* did not give in or by his said will any power or right of distress, nor is any clause or power of distress therein contained to enable the said Defendant to levy any arrears of the said yearly rent or sum so given, and bequeathed to her by the said will as aforesaid in case such yearly rent or sum should at any time be in arrear. Demurrer and joinder.

Spankie

Spankie Serjt. rose to support the demurrer, but the Court called on

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Peake Serjt. to support the plea. He argued that this was not a rent seck, in which case it might have been distrained for under 4 G. 2. c. 28., but a mere personal charge on the party who should be in possession of the land, to pay the annuity so long as he should possess the land; and though equity might call the land in aid of the personalty if the possessor proved insufficient, yet there could be no distress under the will.

BEST C.J. It is impossible to read the words of this will without holding the sum bequeathed a direct charge on the land, which is expressly devised "subject to and charged and chargeable with" the payment of the yearly sum.

Judgment for the Avowant.

ANGELL v. ANGELL.

Feb. 4.

THIS was a writ of right for the recovery of certain lands in *Yorkshire*. To the precept for summoning four knights to elect the grand assize, the sheriff returned that he had caused to be summoned four lawful knights of his county, to wit, *E. P.*, Esq.; *A. B.*, Esq.; *C. D.*, Esq.; and *E. F.*, Esq.; girt with swords.

The gentlemen named in the return being called, appeared in this Court the 3d of *February*, duly girt with their swords, when

In a writ of right, the sheriff having returned, that he had summoned four lawful knights, to wit, *A. B.*, Esq.; *C. D.*, Esq.; *E. F.*, Esq.; and *G. H.*, Esq.: Held, on demurrer, that this return could not be traversed.

Vaughan

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Vaughan Serjt., on the part of the tenant, challenged them, on the ground that they were not true knights, but only esquires, and

Taddy Serjt. objected that they were not described in the return with the title of *Sir*.

This latter objection the Court overruled, holding, that in legal proceedings it is sufficient to describe a man as knight, without adding the prefix *Sir*.

With respect to the challenge, the Court gave the tenant's counsel time to enter it on the record in the proper form, holding on the authority of *Rex v. Edmonds* (a) that it must be entered on record; and ordered the gentlemen returned as knights to appear in Court at eleven this day, adding, that the entry when made, should be considered as having been made *instanter*.

The gentlemen with swords having accordingly again made their appearance this day, and the challenge having been duly entered on record,

Bosanquet and *Spankie* Serjts., on the part of the demandant, after some consultation whether they should take issue on the allegation in the challenge, or should demur to it, elected to demur, contending, on the authority of *Bro. Abr. 263 b. pl. 18.*, that the sheriff's return was not traversable on this ground; observing also, that there were numerous instances in which a sheriff was enjoined to return *legales milites*, as for a knight of the shire; and in which, nevertheless, the person returned was not actually a knight: it was sufficient if he possessed as much land as amounted to a knight's fee.

Vaughan and *Taddy*, *contra*, argued that if the sheriff's return could not be traversed in a case like the present;

(a) 4 B. & A. 471.

neither

neither could it, though he should return paupers instead of knights; nor even upon common juries, though he should return one who had lost his *liberam legem*, or a person of kin to one of the parties. As to qualification by possession of a knight's fee, it could not exist subsequently to the abolition of feudal tenures by the statute of *Car. 2.*

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BEST C. J. Notwithstanding the authority of Lord *Coke* (a), "that the four knights, electors of the grand assize, are not to be challenged," I am of opinion that they may be challenged on substantial grounds, and that Lord *Coke's* reason to the contrary, "for that in law they be judges to that purpose, and judges or justices cannot be challenged," must be deemed insufficient; for if the law were so, a sheriff who, by virtue of his office, selects jurors, must be deemed a judge, and the array could not be challenged, however improperly a sheriff might act. It is said in *Squire v. Reed* (b), that challenge must be made upon the appearance of the knights, and before they are sworn. This shows they may be challenged, if the challenge be tendered in proper time. But I am decidedly of opinion, that upon the point now under consideration, the return of the sheriff is not traversable. Upon subjects of this sort we cannot expect the same authority as upon points that occur more frequently; we must be satisfied with such lights as the old books afford; and the dictum in *Brooks' Abridgment* must be taken to be conclusive, not being opposed by any other case. There is no analogy between the cases of common juries and this case: as to common jurymen, the sheriff only returns that they are good men, without stating that they are freeholders, or whether they possess the other qualifications required by statute; and

(a) *Co. Litt.* 294 a.

(b) *Moor*, 67.

except

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except in the present case, the law does not require a return of the description of the jurors. The writ which commands a sheriff to return a member for a county is in the same terms as the writ in this case. It is seldom that persons of the order of knights are returned for counties. There is not one knight sitting for any county in this parliament. No objection was ever yet made that lawful knights were not returned, and I am persuaded that the House of Commons would not permit any inquiry to be made on this subject, but would hold the return of the sheriff conclusive. It has been said at the bar, if the Court will not allow the sheriff's return to be traversed, he might return paupers, or persons related to one of the litigant parties, under the description of knights. We should allow it to be pleaded that the persons were paupers or relatives of one of the parties in the cause, because such plea would raise questions important to the justice of the cause. Any material fact may be traversed, but I take it to be a general rule, that the Court will not allow a traverse on a matter altogether unimportant. Such traverses would be inconsistent with the good sense on which special pleading is founded. When all persons who held a knight's fee, and who would not be a disgrace to knighthood, were forced to become knights, to secure the return of men of sufficient knowledge and independence it was necessary to require the qualification of knighthood for those who formed, as well as for those who chose the grand assize. Although persons that possessed a knight's fee were called "chevalier (a)," there are many authorities to shew, that unless they were knights, they could not serve on the trial of a writ of right. But the putting an end to that abuse of prerogative so degrading to royalty of compelling men to be knights, and the abo-

(a) *Selden, Titles of Hon.* 707.

lition of the tenure by knight's service (a), have so altered the state of society, that it would now be difficult to find in any county knights sufficient to form a grand assize. If knights sufficient could be found, I believe no one would prefer a grand assize composed of them to one of untitled landed gentlemen. I think, therefore, we may safely act on the authority of the case cited, and hold the sheriff's return conclusive.

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The rest of the Court having delivered opinions to the same effect, the demurrer was allowed. The gentlemen returned as knights were sworn, and retired to elect the grand assize; they returned in about half an hour, when the list of those chosen was read, and the cause adjourned.

(a) 16 Car. 1. 20. 12 Car. 2. 24.

Same v. Same.

VAUGHAN Serjt. next moved for a trial at bar in this case, on an affidavit of the tenant's attorney, which stated, that the property claimed in the action consisted of three-fourths of a certain piece or parcel of land situate in the parish of *Kelsed*, in the county of *York*, near the *Spurn* point of the river *Humber*, with all rights, members, and appurtenances belonging thereunto. And also three fourth parts of certain light-houses erected and being on the said land: and that the revenues, profits, and duties arising from and payable in respect of such light-houses were of very great annual value, three fourth parts thereof being to the amount

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 what circumstances insufficient to support an application for.

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amount of upwards of six thousand pounds by the year: that several acts of parliament had been passed relating to the said light-houses, and the said revenues, profits, and duties, and that several difficult questions were likely to arise upon the construction of the said acts of parliament, or some of them. That the said three fourths of the said piece or parcel of land, and the said light-houses erected thereupon, were claimed by the demandant in this case as alleged heir of *John Angell*, Esq. late of *Stockwell*, in the county of *Surrey*, who died in the year one thousand seven hundred and eighty-four, and that the said *John Angell*, the alleged ancestor of the demandant, left a will, bearing date the twenty-first day of *September* one thousand seven hundred and seventy-four, and also several codicils; and that the said will and codicils were drawn and expressed in an involved and intricate style and manner, and in very ambiguous words, referring to certain pedigrees of the testator's family of great length, obscurity, and antiquity, and containing numerous bequests, devises, and limitations, and thereby giving rise to numerous doubts and difficulties both as to the legal import of many of the clauses and limitations of the said will, and also as to the persons therein designated and intended to be described. That shortly after the said testator's death, the opinions of several eminent counsel were taken as to the effect and construction of the said will, which persons did not agree, but all stated that great difficulties existed; which difficulties were likely to arise in the course of the trial of the action, as deponent had been informed and believed. That the said testator did not leave any near relations, and that it was necessary to go through long and intricate pedigrees, involving many difficult questions of law and fact, as deponent had been informed and believed, in order to ascertain who was the heir at law of the said testator. That the greater part of the

witnesses

witnesses for the tenant resided in *London*, and in other places much nearer to *Westminster* than to *York*, and deponent verily believed, that a claim of so complicated a nature must give rise to much difficulty and doubt, and would require to be discussed with the greatest learning, both from its intrinsic difficulties and the importance of the right which it was brought forward to substantiate."

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A rule *nisi* having been granted,

Bosanquet Serjt., who showed cause, contended, that there was nothing in this affidavit to warrant the application for a trial at bar; and that such a trial might as well be demanded in every special jury case, as upon such grounds as were now adduced. He cited *Crofts* d. *Dalby* v. *Wells* (a), *Rex* v. *Caermarthen* (b), *Holmes* v. *Brown* (c), *Lord Rivers* v. *Pratt* (d), to show that a trial at bar was never granted except in cases of unusual difficulty, and he referred to *Tidd*, 718. where it appeared that a trial at bar had been refused upon the very title now in dispute.

Vaughan and *Taddy* Serjts., in support of the rule, insisted that the great value of property in dispute, the length and probable difficulty of the case, were the usual grounds on which trials at bar were granted. In *Lord Rivers* v. *Pratt*, there had been one trial at *Nisi Prius* before the application for a trial at bar; but the present case, in addition to other grounds for consideration, involved rights of the crown.

BEST C. J. I think no sufficient ground has been laid for this application. When we consider the incon-

(a) *And.* 271.

(b) *Sayer.* 79.

(c) *Doug.* 437.

(d) 1 B. & B. 265.

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venience and difficulty of bringing twenty-four jurors from *Yorkshire*, the accidents to which they might be liable, and the possibility of the cause being postponed for want of a sufficient attendance, an absolute necessity ought to be made out before we yield to the application. No such necessity has been made out here. Causes of much greater importance in point of value have often been tried at *Nisi Prius*; and with respect to the difficulties, they should have been presented to us specifically, in order to enable us to determine whether a Judge at *Nisi Prius* could be equal to meet them or not. The nature of the doubts on the acts of parliament has not been stated, nor has the will referred to been presented for our consideration, and as for the rights of the crown, they will not be affected by the verdict in this cause.

The case which has been referred to in *Tidd*, and which appears to have arisen on the will now in question, is expressly in point. The difficulties upon that occasion must have been the same as upon the present, and unless the Court was then wrong, we must refuse the present application.

The rest of the Court concurred, and the rule was
Discharged.

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SMITH v. FLOWER.

Feb. 6.

IN replevin for taking cattle, the Plaintiff by his pleas prescribed for the right of sole feeding and depasturing a close of pasture land called *Prior's Wood Close*, "from the feast of *St. Thomas* until the 18th day of *April* yearly, and every year."

At the trial before *Gaselee J.* at the last *Somerset* assizes, the Plaintiff produced deeds, (the earliest of which was of the date of 1763,) in which deeds the right was described as commencing on *St. Thomas's day*, and ending on the 18th of *April*; several witnesses proved the exercise of the right between those periods; and that the cattle had been turned in on *St. Thomas's day*, and taken off on the 18th of *April*; but there was conflicting testimony as to the day of turning in.

Gaselee J. being of opinion that the right proved commenced from *Old St. Thomas's day*, directed a nonsuit, with leave for the Plaintiff to move to set it aside, and enter a verdict for himself, if the Court should be of opinion that the *St. Thomas's day* mentioned on the record could be intended to mean *Old St. Thomas's day*.

Taddy Serjt. having obtained a rule *nisi* to that effect,

Wilde Serjt. showed cause. The *St. Thomas's day* mentioned on the record must mean the present statutable *St. Thomas's day*, and not that day which was *St. Thomas's day* before the alteration of the style by 24 G. 2. c. 23. s. 2. But the prescription, implying an immemorial right, must refer to the *Old St. Thomas's day*. The day, therefore, mentioned on the record for

The Plaintiff prescribed for a right of sole pasture "from the feast of *St. Thomas* until the 18th of *April*," and proved the exercise of the right between those periods:

Held, on motion to set aside a nonsuit, that it was not necessary to allege the right in the pleadings from *Old St. Thomas's day*.

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the commencement of the pasturage is not consistent with the immemorial right alleged and proved, and the nonsuit must be sustained. This record, in case of a verdict, would be evidence of a right commencing on the 21st of *December*, but not on *Old St. Thomas's day*. A contract for a sale by the bushel, means by the statutable bushel; and if any other were proved to have been agreed on, such evidence would be a variance from the statement of the contract. *Hockin v. Cook.* (a) In *Doe d. Spicer v. Lee* (b) it was holden, that a lease from *Michaelmas* must be taken to mean *New Michaelmas*; and unless the prescription which has been alleged entitles the Court to imply that *St. Thomas's day* must mean *Old St. Thomas's day*, the allegation has not been supported. Where a tenant entered at *Michaelmas* Old Style, a notice to quit at *Michaelmas* generally has been holden sufficient, *Doe d. Hind v. Vince* (c); but there the notice has reference to the entry.

Taddy. The Plaintiff does not allege a right extending over a greater number of days than he would have alleged if this case had arisen before the statute for altering the style; and though that statute altered the time of year on which those days should fall, it did not alter the appellation or enumeration of the days; so that if it was correct to say before the statute that the Plaintiff's right commenced on *St. Thomas's day*, and ended the 18th of *April*, it was equally correct to say so after the statute; and though the party entitled to the right might be bound in his exercise of it to observe the new distribution of time, he was authorized to describe it by the old denominations. It is not necessary upon the record to state the alteration effected by statute,

(a) 4 T. R. 314. (b) 11 East, 312. (c) 2 Camp. 256.

and

and which the public tribunals are obliged to recognize judicially.

By express agreement, the new or the old division of time may be observed; but, if nothing appears to the contrary, the old denominations must be taken to apply to the old division, though the exercise of rights which accrued under that division may be continued according to the new.

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BEST C. J. The Plaintiff claims a right of common of sole pasture from *St. Thomas's day* to the 18th of *April*; and that claim he supports by a prescription which supposes a grant of ancient date. Undoubtedly in a deed made subsequently to the alteration of the style, *St. Thomas's day* would signify the day appointed for the celebration of the feast of *St. Thomas* by the statute; but, for the same reason, the parties who speak of the *St. Thomas's day* in an ancient grant must mean the day on which the feast was celebrated at the time of the grant. If they must mean that, in speaking of the grant, so must they in speaking of the prescription; and the difficulty with regard to the 18th of *April* is to be solved in the same manner. This will not alter the rights of the parties, because they are expressly provided for by the 5th section of the statute. The right, therefore, has been well described on the record, and the rule must be made absolute.

PARK J. expressed a similar opinion.

BURROUGH J. The prescription is alleged from time whereof the memory of man is not to the contrary: he who pleads such a prescription could only mean to speak of the old division of time; and though he pleads after the alteration of the style, he must in speaking of such a prescription mean the same distribution of time as existed before. Every allegation

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of this sort must be taken according to its legal effect; and the legal effect of an ancient prescription implies the ancient division of time.

GASELEE J. considered the case as attended with some doubt and difficulty, but thought the safer course would be to hold the pleading sufficient.

Rule absolute.

Feb. 7.

WYNDOWE v. The Bishop of CARLISLE and
FLETCHER.

Costs not allowed in
quare impedit.

QUARE *impedit*, in which the Defendant *Fletcher* obtained judgment as in case of a nonsuit, last term. The prothonotary having refused to tax the costs, on the ground that none were allowed in *quare impedit*,

Cross Serjt. moved for a rule to shew cause why he should not be directed to tax the Defendant's costs.

He urged, that by 14 G. 2. c. 17. costs are given to defendants upon judgment as in case of nonsuit, in all cases where they would upon nonsuit be entitled to the same; that by 4 Jac. 1. c. 3. defendants are entitled to costs on a nonsuit, in all cases where the plaintiff or demandant might have costs in case judgment should be given for him; and he contended, that a plaintiff was entitled to costs in *quare impedit*. In *Pilfold's* case (a), indeed, it was holden, that where damages were newly given by a statute subsequent to the statute of *Gloucester*, the plaintiff should only recover the damages given and no costs; and in *quare impedit* damages were for the first time given by the statute of *West-*

(a) 10 Rep. 116.

minster. But Lord Coke himself contradicts the rule laid down in *Pilfold's* case. In 2 *Inst.* 289. he says, "That the statute of *Gloucester* extends to give costs where damages are given to any demandant or plaintiff in any action by any statute made afterwards." The rule in *Pilfold's* case has also been narrowed by several modern decisions, from which it may be collected, that the plaintiff is entitled to costs in all cases where single damages are given by statute to the party grieved, though the statute may be subsequent to that of *Gloucester*, and though costs are not particularly mentioned in it.

In *Witham v. Hill* (a) *Willes* C. J. seemed strongly inclined to overrule *Pilfold's* case; and in *Greetham v. The Hundred of Theale* (b), *Cresswell v. Hoghton* (c), *Tyte v. Glode* (d), and *Jackson v. The Inhabitants of Calesworth* (e), the Court decided, that the statute of *Gloucester* extends to give costs to the party injured, where no damages were recoverable, either before or by that statute, but have been created by a subsequent one, and which subsequent one gives damages without mentioning costs.

Thrale v. The Bishop of London (f) is, indeed, opposed to these decisions; but *Jackson v. The Inhabitants of Calesworth* was not brought to the notice of the Court of Common Pleas in the argument on that case; nor was the passage in 2 *Inst.* 289. distinctly adverted to. The statute of *Gloucester* is a remedial act, and ought to have a favourable interpretation.

BEST C. J. This question has been decided, on much consideration, in *Thrale v. Bishop of London*, and in *Pilfold's* case; and whatever may be our opinion on the

(a) 2 *Wils.* 91.(b) 3 *Burr.* 1723.(c) 6 *T. R.* 355.(d) 7 *T. R.* 267.(e) 1 *T. R.* 71.(f) 1 *H. Bl.* 530.

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merits of the case, we are bound by those decisions. The decisions turn on the general principle, that no damages are given on the recovery of a spiritual right; and where no damages are given there is no claim for costs. In the cases to which we have been referred damages were allowable; but in *quare impedit*, the Plaintiff can only recover a penalty, — two years amount of the value of the living.

Whether or not the statute of *Gloucester* gives costs in cases in which damages are given by a subsequent statute we need not decide, for no subsequent statute gives damages in *quare impedit*.

The rest of the Court held themselves bound by the former decisions, and the rule was

Refused.

Feb. 10.

SNOW and Others v. PEACOCK and Others.

The Defendants, bankers in a small town, gave notes of their own to a stranger, of whom they asked no questions, in exchange for a 500*l.* Bank of *England* note:

Held, that the Plaintiffs, from whom the 500*l.* note had been stolen, and who had duly advertised their loss, might recover the note of the Defendants.

TROVER for a 500*l.* Bank of *England* note. The facts of the case as made out on the trial before *Best C. J.*, *London* sittings after *Michaelmas* term last, were as follows:

In *September* 1824 the Plaintiffs, bankers in *London*, received from one of their customers a dividend warrant for the receipt of 1379*l.*, the amount of which they were to place to his credit. The next day they delivered it to a confidential porter of the house, who received at the Bank of *England* in exchange for it various notes, and among them the note in question. Of this note he was robbed on his return home. Complaint was

imme-

immediately made at *Bow-Street*; handbills and placards published; application was made to the Bank to stop payment if the note should be offered there; and its number, date, and amount, were advertised in the *Hue and Cry*, a paper circulated by the Secretary of State for the Home Department to announce the perpetration of offences.

On the 24th *April* 1825 the note was presented at the Bank of *England*, and stopped. It was then traced to the Defendants, who kept a bank at *Bourne*, a very small town in *Lincolnshire*, being a branch of another bank at *Sleaford*.

The note had been presented at the bank at *Bourne*, on the 13th *April*, by a respectable looking man, who two hours before had arrived in the *London* mail. The Defendant's clerk, without asking any questions of this person, of whom he knew nothing, or learning any thing more about him than that he said his name was *Edwards*, after refusing to give him Bank of *England* notes, gave him 500*l.* worth of the Defendant's notes, in exchange for the note in question, which was that day forwarded to the Defendant's correspondent in *London*, and placed to their credit. The clerk said it was the usual course of the Defendant's business to exchange notes in that way; but in the course of eleven years, during which he had been the Defendant's clerk, he had never before changed a 500*l.*, a 300*l.*, or a 200*l.* note. He had never seen the *Hue and Cry*; had no suspicion that the note had been stolen; and stated that there were at that time many fairs in the neighbourhood, at which it would be more convenient to negotiate the Defendant's notes than a 500*l.* Bank of *England* note.

Evidence was received of the caution observed by the Bank of *England*, and *London* bankers, in the exchange of large notes; and the Chief Justice left it to

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the jury to determine, as well whether the Plaintiff had acted with due diligence in circulating intelligence of the robbery, as whether the Defendants had exercised sufficient caution, and had observed the usual course of business, in exchanging the note.

The jury found a verdict for the Plaintiffs; but added, that not the slightest suspicion attached to the motives of the Defendants.

Wilde Serjt. having obtained a rule *nisi* for a new trial, on the ground that the Chief Justice ought to have left the case to the jury as a question purely of *bona fides* or *mala fides*, in which the exercise of caution formed only one of several ingredients,

Vaughan and *Bosanquet* Serjts. now shewed cause. Where a loss must fall on one of two innocent persons, it has always been holden that it shall fall on him who has omitted to proceed with the ordinary caution which is required and exercised in the course of his business. This is the principle to be deduced from all the cases, *Miller v. Race* (a), *Grant v. Vaughan* (b), *Peacock v. Rhodes* (c), *Down v. Halling* (d), [which have in effect overruled *Lawson v. Weston* (e),] and is expressly pointed out and relied on by *Bayley J.* in *Gill v. Cubitt* (f), where he reviews all the former decisions. The Defendant's clerk did not proceed with the caution which the course of his business required, or which a man of ordinary prudence would have exhibited, when in a small town he gave his own notes in exchange for a 500*l.* bank of *England* note without making any inquiry, although he had never exchanged so large a note before; the jury,

(a) 1 *Burr.* 452.
 (b) 3 *Burr.* 1516.
 (c) *Doug.* 633.

(d) 4 *B. & C.* 330.
 (e) 4 *Esp.* 56.
 (f) 3 *B. & C.* 466.

therefore,

therefore, was properly directed. The case of *Solomons v. The Bank of England* (a) is in point, and shews, that where due caution has not been observed, it is immaterial whether the party receives a bill of exchange or a bank note payable on demand. In *Solomons v. The Bank of England*, the Court decided that the loss should fall upon the Plaintiff's principals, because they had taken of a stranger, without inquiry, a 500*l.* bank note in a foreign country, where notes of such an amount were seldom seen. In *Down v. Halling* the same principle was applied to a banker's check, and it would apply equally to current coin, if the current coin could be identified.

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Wilde and *Spankie* Serjts. in support of the rule. Where a loss must fall upon one of two innocent persons, *potior est conditio possidentis*, provided he has acted with good faith. Want of caution is only one of many circumstances from which, taken together, an intention to act dishonestly may be inferred; and even admitting that there might have been a want of caution on the part of the Defendants, the jury have found that it was not accompanied with bad faith, and the Defendants having given value for the note, the chief, if not the only question that ought to have been left to the jury was, whether they had acted with *bona fides* in doing so. But the Defendants acted with sufficient caution; for it would cripple the circulation of the country if the same caution were required in the transfer of bank notes as is required in the transfer of bills of exchange: conduct which may be deemed cautious in the transfer of a bank note might be esteemed grossly negligent in the transfer of a bill of exchange; and as to the course of business, there is no peculiar course which can be predicated of the transfer

(a) 13 *East*, 135.

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of bank notes or money. They stand on the same footing, *Wookey v. Pole*. (a) In *King v. Milsom* (b), Lord *Ellenborough* held, that a public-house keeper might without suspicion or risk take a 50*l.* bank note, and give change in payment for a glass of brandy.

In *Lawson v. Weston*, Lord *Kenyon* held it sufficient for a person who had discounted a bill of exchange to shew that he had paid value for it: to require more would paralyse, he said, the paper circulation, and with it the commerce of the country. The principle of that decision applies with double force to bank notes, which are equivalent to cash, and must apply to such notes, even though it be doubted as to bills of exchange. In *Peacock v. Rhodes*, too, Lord *Mansfield* says, "The question of *mala fides* was for the consideration of the jury;" and perhaps the opinions of dead, and, as it were, canonised judges may, upon some points, be received with more respect than the decisions of their successors. To consider the question as any other than one of *mala fides* will introduce great uncertainty.

BEST C. J. One who has lost a note payable to the bearer of it ought immediately to give notice of his loss to the public in such a manner as is most likely to prevent innocent persons from taking it. If after such notice be given, a person takes that note from a stranger without making such inquiries as prudence would suggest to any one acquainted with the business of the world should be made, the owner of the note may recover the value of it from him. Although the loss of the note has not been duly advertised, yet if it has been received under circumstances that induce a belief that the receiver knew that the holder had become possessed of it dishonestly, the true owner is entitled to recover

(a) 4 B. & A. 1.

(b) 2 Camp. 5.

its value from the receiver. The negligence of the owner is no excuse for the dishonesty of the receiver. But the negligence of the one may be an excuse for the negligence of the other, and might authorise him to defend himself on the maxim that has been referred to at the bar, *potior est conditio possidentis*. The receiver might say, "If you had given notice of your loss, my attention would have been awakened, and I should not have given money for this note." I thought there was not the slightest ground for suspecting in this case any dishonest motive in the clerk of the Defendants, and the Defendants themselves knew nothing of the transaction. An excessive anxiety to get his employers' notes into circulation prevented him from using due caution in inquiring respecting a perfect stranger for whom he discounted a much larger bill than in the course of eleven years' service he had ever before received from any one. I left it to the jury to say, whether they thought the Plaintiffs had done all that it was proper for them to do to make the loss of the bill known to the world, and if they had, whether the Defendants' clerk had used due caution at the time he took this bill. A new trial has been moved for, on the ground that the only question that should have been left to the jury was, whether the Defendants took the bill *bona fide*, and that want of caution on their part was only to be received as evidence of *mala fides*. It has been argued, that if we raise any other question in cases of this sort we shall occasion great uncertainty. Whether this uncertainty is from our decision clashing with those of our predecessors, or that by extending the inquiry to other matters beside the integrity of the parties, we shall embrace topics on which no satisfactory judgment can be formed, has not been explained to us. Take the argument either way, there is no foundation for it:

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judges have not been in the habit of getting at what they conceived to be justice in a particular case by deciding contrary to former decisions. They know this would introduce the uncertainty which those who are ignorant of the law suppose to exist: men who have knowledge sufficient to perceive how difficult it is to apply the principles established by old cases to all the complicated and continually varying transactions of the world, must be surprised that there is not much more uncertainty. The direction that I gave to the jury is supported by the concurrent authority of all the decisions in Bank. The inquiry, whether proper diligence has been used will not be too extensive or too difficult for a jury of merchants or a special jury in the country. Negotiable bills and notes, although originally created for commercial purposes, are now become the common circulating medium in all dealings. Every man's daily experience will teach him what degree of caution should be used; and what inquiries should be made before a bill or note to a large amount be taken. It has been said that bank bills are money. They have never been so considered either by lawyers or political economists; on the contrary, they are said to be things exchangeable for money. As far as respects this cause there is no difference between a bank bill and a bill of exchange payable to a particular person, and by him indorsed in blank: both are payable to bearer. Bank notes form a principal part of our circulating medium, and it would be injurious to commerce to do any thing that should have the effect of checking their free circulation. When this case was presented to me on the sudden at Nisi Prius, I felt alarmed at the difficulty of laying down a safe rule on a subject of so much importance. I thought, however, and told the jury in my summing up, that it could not impede the circulation of bank notes to require every man that dealt with them to use that proper degree

degree of caution and circumspection which his own interest would require him to use in all the occurrences of life, whilst the neglect of such caution could not fail to encourage the robbery of coaches, and the stealing of notes by clerks and servants. I have, since the trial, often considered this case, and am satisfied that the rule laid down by me tends rather to promote than check the circulation of negotiable notes. Money can seldom be identified. The identity of notes can easily be proved. Thieves were on that account for a long time afraid to touch them; and because persons usually carried notes with them on their journies, highway robberies were seldom committed. The contrivances lately put in practice for getting rid of stolen notes, and the careless manner in which they have been taken, have encouraged the stealing of them. My rule will check this carelessness, and defeat the contrivances of the agents of thieves. Surely that which renders the possession of the owners more secure cannot operate as a check on the circulation of bank notes. The notes will still be taken, not on the credit for solvency of the person from whom they are received, but of the parties to them. No other caution is required than that which is necessary to ascertain that a man who tenders a bank note of large value to a person to whom he is an utter stranger is not likely to be a thief or the agent of thieves. Should the receiver be deceived after he has made reasonable inquiry, he will be protected by the negotiability of the instrument he has taken. To require this degree of caution will increase the value of bank notes by rendering their possession more secure to the owners, and thereby giving them an advantage over gold and silver in domestic dealings.

The right to retain stolen bank notes against the owner is a right founded on the policy of increasing their circulation rather than justice. This policy cannot be carried

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carried further than to protect such takers of notes as in taking them have used due diligence.

Negotiable instruments, although now generally used, were originally the creatures of commerce. By the principles of commercial law they must be governed, and that law requires, in all transactions, good faith and due diligence.

I will now consider the cases that are to be found in our books on this subject. In *Grant v. Vaughan* Mr. Justice *Wilmot* says, "If there was negligence on one side and none on the other, that would turn the scale." Now here there is no negligence on the part of the Plaintiffs, but there was great negligence on the part of the clerk of the Defendants. The permitting such negligence would be, as Lord C. J. *Abbott* said, like putting up a board, "Notes taken, and no questions asked if you will take our notes in return." In *Miller v. Race*, Lord *Mansfield*, referring to a case decided by Lord *Holt*, said, that where the instrument was a small note, and taken in the usual course of business, the Plaintiff was entitled to recover; but if it had been a 1000*l.*, if it had not been in the usual course of trade, he would have had no right to sue. In *Peacock v. Rhodes*, *Grant v. Vaughan*, and *Solomons v. The Bank of England*, the inquiries were, whether the bills were taken in the usual course of trade, or whether that degree of caution which the usual course of trade prescribes had been used. I admit that in many, if not in all of those cases, it was also put to the jury whether the transaction was *bonâ fide*, but the circumstances of the case called for such an inquiry. It seems to be admitted that the doctrine laid down in *Gill v. Cubitt* goes the whole length of establishing my directions to the jury, although Lord Chief Justice *Abbott* did not put the question to the jury in that case, precisely in the way in which I put it; but the difference arose from the difference in the circumstances
of

of the two cases. His Lordship's judgment in the King's Bench completely supports the principle on which I proceeded in the present case.

Speaking of the case of *Lawson v. Weston*, he says, he thinks that that case has led to mischief, and has facilitated fraud: he further says, "It appears to me to be for the interest of commerce that no person should take a security of this kind from another without using *reasonable caution*;" — that was the question I left to the jury. — "If he took the security from a person whom he knew, and whom he could find out, no complaint could be made of him; but if it is to be laid down as the law of the land, that a person may take a security of this kind from a person of whom he knows nothing, and of whom he makes no inquiry, it appears to me that such a decision would be more injurious to commerce than convenient for it."

He further says, "It seems to me it is a great encouragement to fraud, and it is the duty of the Court to lay down such rules as tend to prevent fraud and robbery, and not give encouragement to it." I entirely subscribe to this, and I think it is our duty to put it as a question of caution. If we do that, we shall establish a principle in the law which cannot fail to have the effect of giving protection to this species of property.

Mr. Justice *Holroyd* said, "If he takes it with a view to profit arising from interest or commission, under circumstances affording reasonable ground of suspicion, without inquiring whether the party of whom he took it came by it honestly, or if he takes it merely because it is drawn upon a good acceptor, he takes it at a risk." In the case of *Down v. Halling* the question was left to the jury exactly as I left it, and the Court never doubted the propriety of the Chief Justice's direction.

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PARK J. We should be overturning all the decisions of the Courts, — *Miller v. Race*, *Grant v. Vaughan*, *Peacock v. Rhodes*, *Gill v. Cubitt*, and *Down v. Halling*, — if we were to make this rule absolute. The decision which the Court comes to on this occasion is perfectly consistent with every one of those cases. *Miller v. Race* was a case that could excite no suspicion: an inn-keeper, in the ordinary course of his business, having a guest who stayed for a considerable time, was presented with a bill or note for 21l. 10s.; but there is something which shows what Lord *Mansfield's* opinion would have been in a case like this: he says, “ If it had been a note for 1000l. it might have been suspicious, but this was a small note for 21l. 10s. only, and money was given in exchange for it.” And in *Grant v. Vaughan* Mr. Justice *Wilmot* says, “ He made enquiry about it, and then gave change.” Though the inquiry might not be very important, yet that circumstance weighed with him in the decision he came to. In *Peacock v. Rhodes*, the main question was, whether the case was properly left to the jury, and the words *bona fides* are not used in the course of that argument of Lord *Mansfield*: the question of *mala fides*, he says, “ was for the consideration of the jury: the circumstance that the buyer, and also the drawers, were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration; but they have considered them, and found that it was received in the course of trade, and therefore the case is clear.” And in *Peacock v. Rhodes* it will be recollected, that though the plaintiff was not acquainted with the defendants, yet it was proved that before that time he had frequently received bills drawn by them in the course of their trade, and those bills had been duly paid. Here was the usual course of dealing. The case of *Solomons v. The Bank of England* it is impossible to distinguish from the

the present. But in *Lawson v. Weston*, I think Lord *Kenyon* is decidedly wrong: he lays down a principle contrary to *Miller v. Race*, and he does not feel that the amount of the bill is of any importance at all. Now, whether the bill is for 1000*l.* or 500*l.* or 50*l.* makes all the difference in each case. Lord *Ellenborough* indeed held at *Nisi Prius*, that a public-house keeper selling gin and brandy to his customer, and taking a 50*l.* note, was not an object of suspicion. I think it impossible to support that decision. But in *Solomons v. The Bank of England*, the reasoning of Lord *Kenyon* is extremely different from the opinion he expressed in *Lawson v. Weston*. He says, "When the Plaintiffs were informed of the circumstances, and were applied to in order to give information of the person from whom they received the bill, they refused to give a satisfactory account of it. Under these circumstances it is impossible to say that there was not some suspicion thrown upon them of their being privy to the fraud, and that was all I told the jury, to whom I was about to leave the question of fact for their decision."

I entirely concur with my Lord Chief Justice in his mode of putting the question in the present case. The Court in *Gill v. Cubitt* held the jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man.

It has been said no course of trade has been proved here; but the clerk proved, that for the eleven years he had lived at *Bourne* he never knew of his employers taking a bill of this sort; how then could this bill be taken in the usual course of their business? Under these circumstances, it seems to me that we should be bringing the law into uncertainty by a decision on the present occasion different from that of *Gill v. Cubitt*.

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BURROUGH J. I do not feel myself at liberty to be silent in this case, which is one of the most important that can come before the Court. Without meaning to reflect on the Defendants, I am clearly of opinion that this note has been received under circumstances, which, if they were justifiable, would tend very much to encourage the receipt of stolen goods.

What ought to have been the conduct of these gentlemen, and what has been their conduct? It has been this: A note of extraordinary amount has been presented to them at their banking-house for change; they ask not a single question; the only account they get from the party is, that his name is *Edwards*. What ought their conduct to have been? They should have asked the holder where he came from, and how he came by the note; four or five questions would have excited suspicion, which would have prevented their taking it, and it would have put a stop to this; then their duty would possibly have been to have detained the man: the probability is, he was a receiver of stolen goods. Questions of that sort would have been most important for the purpose of giving evidence against him in the event of trial afterwards. But are parties to be entirely silent when their duty to the public requires them to be active and to exert themselves; or are they to avoid asking questions, because such questions may prevent them from obtaining a note which would give them the benefit of negotiating notes of their own to the amount of 500*l*? There was their own personal benefit on one side, and their duty to the public on the other; and they have not pursued a course tending to protect the public from frauds of this kind. I need go no further than to say, they have acted without due care. The case of *Solomons v. The Bank of England* is so much like this, that it is impossible to distinguish it. I have a note I took of it. It was an action of trover for a bank-note of 500*l*. The note

was

was stolen from *Batson* and Co. The plaintiff received it from *Hymen* and *Hendricks*, who were Jews at *Middleburgh*: the note was of an amount that was not of ordinary currency. The plaintiff, who was the agent of *Hendricks* and Co., came to the Bank of *England* to ask if the note was good, and told all the circumstances. He produced the letter enclosing the note; said he had received it as the agent of *Hymen* and *Hendricks*, and had accepted bills for the amount. In consequence of what passed, he wrote to his correspondents at *Middleburgh* to ascertain how they came by the note: they answered, they had received it from a man in an olive-coloured coat. How like that is to this case, where the Defendants never asked who or what the holder was.

Lord *Kenyon* told the jury he did not think *Hymen* and Co. had properly accounted for the possession of the note, and he manifested an opinion unfavourable to the plaintiff, upon which the counsel chose to be nonsuited. Lord *Kenyon* said, "The house at *Middleburgh* ought to have given some account how they came by the note. Notes of this amount not being ordinarily current there, if they received it contrary to conscience they ought not to recover it. The bank had a right to say, Show us that you hold this note properly; that is the point; not *mala fides*." Mr. Justice *Buller* says, "I consider the plaintiff as the agent of *Hendricks* and Co., and the plaintiff's title is incomplete. The defendants prove that the bill is improperly obtained; the plaintiff has notice of it: if it was not stolen, but honestly obtained, they should show it, but they give no account of it at all: it is impossible they should not know of whom they had it. It would be otherwise if it were a 10*l.* note." The Defendants in the present case should have made proper inquiries, and no doubt they would have found out who this man, calling himself *Edwards*, was. At

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quiries need not have been confined to the holder himself: the man was a perfect stranger: he came to *Bourne*, where he had never been seen or heard of before. Suppose they had inquired how long he had been in the town; at what inn he had put up, and in what manner he came. Suppose, on going to the inn, they had found that he came outside of a coach; that the very moment he got down, his first act was to go to the bank with a note for 500*l*. Should not that have induced the bankers to have paused before they parted with their money to a man coming under such suspicious circumstances? I am of opinion, therefore, that the direction of the learned Judge to the jury was perfectly right in point of law; and I cannot see any ground of imputation on the verdict of the jury.

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Rule discharged.

MARTIN and Another, Assignees of a Bankrupt, Feb. 11.
v. NIGHTINGALE.

THIS was an action by the assignees of a bankrupt. At the last *Cambridge* assizes, the Plaintiffs, to prove the trading of the bankrupt, called a witness, who stated, that at the time of the bankruptcy she was a widow; that her husband had carried on the business of a livery-stable keeper and horse-dealer, and that she had succeeded in the business of the livery stables, but had never taken out a horse-dealer's licence. Another witness stated, that he had often bought horses for her; *A.* was a horse-dealer and livery-stable keeper: after his death his widow carried on the business of the livery-stable, and bought horses to let, which she occasionally sold to customers:

Held, *per Abbott C. J.* at *Nisi Prius*, a sufficient trading to support a commission of bankruptcy against the widow.

F i s

that

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that they were bought for the purpose of letting, but that she occasionally sold one if a customer desired it. *Abbott C. J.*, who tried the cause, held this to be sufficient evidence of a trading; and the Defendant's counsel having acquiesced in his opinion, the point of the trading was not left to the jury, and a verdict was found for the Plaintiff.

Wilde Serjt. obtained a rule *nisi* for a new trial, on the ground that the trading of the bankrupt had not been sufficiently established.

Vaughan Serjt., who showed cause, contended that the horses, though bought for the purpose of being let, were always ready to be sold, and that a livery-stable keeper must also gain a living by buying and selling corn.

Wilde Serjt. The horses were bought only for the purpose of letting; and there is no instance in which a purchase and sale, made ancillary to a business which is not itself a trading, has been holden to constitute a sufficient trading to support a commission of bankrupt. *Patten v. Brown. (a)*

The Court took time to consider, and afterwards said, they thought there was sufficient evidence of trading to go to the jury; and as the question had by consent been withdrawn from the consideration of the jury, and left to the Judge, they would not send the cause down again.

Rule discharged.

(a) 7 *Taunt.* 409.

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WALCOTT, Vouchee.

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WHEN the vouchee executed the warrant of attorney, he was sane, but before the passing of the recovery his intellects became impaired.

Onslow Serjt., upon an affidavit of the vouchee's sanity at the time of executing the warrant of attorney, moved that the recovery might pass, and referred to *Selwyn v. Selwyn (a)*; but

The Court refused the application; observing, that if the vouchee had been restored to reason he might have revoked the warrant of attorney before the passing of the recovery, and *Onslow*

Took nothing.

(a) 2 Burr. 1131.

Where the vouchee became insane between the time of executing the warrant of attorney and the passing of the recovery, the Court refused to pass the recovery.

BERRY v. JENKINS.

Feb. 11.

THE attorney for the Plaintiff having put in bail for the Defendant, and having acted on both sides, deluding the parties and preventing an interview, the Court on the motion of *Wilde* Serjt. set aside the proceedings, and made the attorney pay the costs.

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Feb. 13.

CLARK v. JOHNSON and Another.

Held, upon motion for a new trial, that the mother of an illegitimate child might recover, in an action for money had and received, money deposited with a parish-officer to meet any charges to which the parish might be liable in respect of the child.

THIS was an action for money had and received, brought by the mother of a bastard child, against the overseers of *Osgodby*, in *Yorkshire*, to recover 60*l.* which upon the birth of the child had been deposited with them in the year 1818, on her account, to meet any charges which might accrue in respect of the child. The money, with the consent of all parties, was placed in a bank at *Scarborough*; a receipt was given by the bankers to Mrs. *Clark* (the Plaintiff), and the overseers for the time being, of the township of *Osgodby*; and interest to the amount of 2*l.* 14*s.* *per annum* was received by the Plaintiff till 1821, when the bankers became bankrupt. The Defendant *Johnson* proved under the commission, and received a dividend of 5*s.* in the pound.

The child, who was still living, had never become chargeable, nor had the mother been taken before any magistrate.

At the trial at the last *York* assizes, *Bayley J.* thought that the child being still in existence, there was a continuing liability, and he directed a nonsuit, with liberty to the Plaintiff to move to set it aside and have a new trial.

Vaughan Serjt. having accordingly obtained a rule *nisi* to this effect, on the ground that the payment of a gross sum to overseers for the support of an illegitimate child is illegal, as giving the overseers an interest in the death of the child, *Cole v. Gower*, (a)

(a) 6 *East*, 110.

Wilde Serjt. shewed cause. The money paid to the overseers was not paid in the way of discharge, but as a prospective indemnity; and though it would be illegal to take unconditionally a gross sum in discharge of the putative father's liability, the statute requiring the interposition of a magistrate, and the security of a bond for the weekly maintenance of the child (*a*), yet there can be no objection to taking a sum conditionally to meet contingent charges; an arrangement which excludes the overseers from any interest in the death of the child. The power compelling the putative father to provide for the child was given by statute, for the security of parishes; and that which a party may be compelled to give he may be allowed to give voluntarily. Besides, the Plaintiff, by receiving interest, recognized the validity of the transaction. The payment of interest to the mother shows that the overseers did not take the money unconditionally, or as a discharge; and if they might take a week or a fortnight's expences in advance, they might equally take a larger sum on the same conditions. The taking the present sum would not have prevented them from demanding more, if the expence of maintenance had amounted to more; and whatever they received they were bound to account for to the parish; *Rex v. Martin.* (*b*) In *Cole v. Gower* and *Townson v. Wilson* (*c*) the money was taken absolutely in discharge of the putative father's liability.

Vaughan Serjt. The money was taken unlawfully, the statutes having interposed the authority of a magistrate to prevent the mother or putative father from being imposed on, and the parish from being burdened.

(*a*) See 18 *Eliz. c. 3. s. 2*,
6 *G. 2. c. 31*, 49 *G. 3. c. 68. s. 3*,
34 *G. 3. c. 170*.

(*b*) 2 *Camp. 268*.
(*c*) 1 *Camp. 396*.

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Besides

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Besides which, the object for which this money was paid must be presumed to have been attained, for the parish failed to show that they had incurred any charges, though seven years had elapsed since the birth of the child:

Cut. ad. vit.

BEST C. J. now delivered the judgment of the Court, and, after stating the circumstances of the case, proceeded,

We are of opinion that the money for which this action was brought was illegally obtained from the Plaintiff; and although to avoid a disclosure which would have brought disgrace on her, she permitted it for a long time to remain in the hands of the bankers, and received interest on it, we do not think these circumstances can make a transaction lawful which was originally unlawful. There is no law that gives parish officers any authority to require a sum of money from the parents of an illegitimate child, either for the future maintenance of such child, or to be deposited as a security for indemnifying a parish against the charge of maintaining it. The statutes that have provided for the maintenance of bastards are 18 *Elix. c. 3.*, 7 *Jac. 1. c. 4.*, and 6 *G. 2. c. 31.* By these statutes, if a woman shall be delivered of a bastard child that is *likely to become chargeable to any parish*, or shall declare herself to be with child, and that such child is likely to be born a bastard, and to become chargeable to any parish, a *magistrate may* require the person charged on the oath of the mother with being the father of the child to pay a weekly sum for its maintenance, together with any previous expences that have been incurred, and to give security to indemnify the parish. The authority to protect the parish is not given to parish officers but to magistrates. The magistrates are not empowered to demand

demand or accept a sum of money for security. But it may be said, May not the mother consent to deposit a sum of money with the officers, rather than be exposed herself, and expose the father of the child, by going before magistrates? I think the law cannot permit such a compromise. It has been decided by the Court of King's Bench, that officers must not receive a specific sum, on condition of discharging the parents from all farther liability. This is founded on a principle of policy, namely, that the paying sums of money for the maintenance of illegitimate children makes it the interest of the parish officers that the children should die, and prevents the officers from paying that attention to the children that humanity requires. The present case is not open to that objection; but the interest of parish officers in the death of a child so left to them, is but as inhabitants of the parish, to the whole of which parish, and not to the officers only, the advantage would accrue, from getting rid of the charge of its maintenance. This interest of the parish officers that the children should die is by no means the most weighty objection to allowing a departure from the mode of indemnifying parishes prescribed by law. The other objections apply to the present case as strongly as to the case in the King's Bench. Cases certainly sometimes occur in which it would be desirable to avoid publicity, and in which there would be no objection to allow officers to take *security* from the parents of illegitimate children, without going before magistrates. Such securities can never be used but for the purpose of indemnifying the parish; but the permitting deposits of money opens the door to extortion and fraud. The transaction supposes the necessity of secrecy; the vestry cannot know what bargain their officers have made. Parents whose situations require such secrecy will submit to any terms that parish officers may think proper to dictate.

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The parish officers may get the deposits into their own hands. In that case the parish would have no security from the deposit, nor the parents against being called on to maintain the child, if the officers misapply the money deposited. It cannot be safe to allow the persons who usually hold the situations of parish officers to have in their hands the sums that might be obtained in large parishes as deposits towards the security for the maintenance of bastard children. If the money be disposed of as it has been in this case, it is subject to the loss that has happened from the stoppage of the banks in which it is lodged; and although it be deposited in the joint names of the parents and officers, in the event of the deaths of the parents, the officers or surviving officer may possess themselves of it. How long is the money to remain deposited? If as long as there is a possibility of the child's becoming chargeable, that may be as long as it lives. As the child is likely to survive its parents, they have little chance of ever seeing their money again; although they have maintained, educated, and established their child in the world. We think, therefore, that the permitting such deposits to be required is inconsistent both with the letter and spirit of the laws relative to the maintenance of bastards, and that the Plaintiff had a right to disaffirm the bargain she had made with the Defendants, and to recover back the money she has paid. The nonsuit must, therefore, be set aside, and a new trial granted.

Rule absolute.

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WILKINSON v. TATTERSAL.

Feb. 13.

THE Defendant, on an affidavit that the cause of action, if any, arose in the county of *Lancaster*, and not elsewhere, had obtained a rule *nisi* to change the venue from *London* to *Lancashire*.

An affidavit that the cause of action arose in *Lancashire* and not elsewhere, having been answered by an affidavit that it arose on a contract for the purchase of 500 bags of cotton, to be shipped at *Trieste* and delivered at *Liverpool*, the Court refused to remove the venue from *London* to *Liverpool*.

Taddy Serjt. shewed cause, upon an affidavit that the action was brought upon a contract entered into for the purchase of 500 bags of *Egyptian* cotton, to be shipped at *Trieste*, out of the county of *Lancaster*, and to be delivered at *Liverpool*. Also, that two material witnesses resided in *London*.

On the authority of *Neale v. Neville* (a), where the practice as to changing venues was much considered, he contended that this affidavit was a sufficient answer to the application.

Bosanquet Serjt., in support of his rule, urged that the evidence necessary to support the action, and the right to bring the action, were very distinguishable from the cause of action. (Per *Heath J.* in *Clarke v. Reid*. (b)) That the shipping at *Trieste* might satisfy an undertaking to give material evidence out of the county of *Lancaster*; but that the contract and cause of action, namely, the undertaking to deliver the goods at *Liverpool*, arose in *Lancashire*, and not elsewhere. But even if it should be deemed to have arisen only partly in and partly out of *Lancashire*, the Court would not discharge the rule for changing the venue. *Henshaw v. Rutley*. (c)

(a) 6 *Taunt.* 565.

(b) 1 *N. R.* 310.

(c) 1 *N. R.* 110.

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BEST C. J. The affidavit that the cause of action in this case arose in *Lancashire*, and not elsewhere, turns out to be incorrect. The point in dispute has been once carefully considered and decided; and in matters of practice particularly, where a point has been once decided, the Court should abide by the decision. The case of *Neale v. Neville* has determined this question; and the Defendant's rule must be

Discharged.

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BLEASBY and Another, Assignees of BYERS, a
Bankrupt, v. CROSSLEY and Others.

Where a petitioning creditor's debt was created by his giving the bankrupt a check on the petitioning creditor's banker:

Held, that to establish the debt the payment of the check must be proved. That it was not sufficient (especially where the bankrupt's papers came to the hand of the petitioning creditor) to show the check to have come to his hands again, and that his bankers, the day after the date of the check, paid on his account to the bankrupt's bankers a sum corresponding with the amount in the check.

A VERDICT having been found for the Plaintiffs at the trial of this cause, *London* sittings after *Michaelmas* term last,

Wilde Serjt. obtained a rule *nisi* to enter a nonsuit instead, or have a new trial, on the ground, among other objections, that the Plaintiffs had not proved a sufficient petitioning creditor's debt to establish the bankruptcy of *Byers*.

The evidence at the trial as to this point was as follows:

Smith, the petitioning creditor, proved that *Byers* came to borrow of him 100*l.*; that he lent him a check for that sum, drawn on his, the petitioning creditor's bankers, *Pole* and Co. This check, which was crossed in the handwriting of *Byers*, with the names of *Sykes*, *Snaith*,

to show the check to have come to his hands again, and that his bankers, the day after the date of the check, paid on his account to the bankrupt's bankers a sum corresponding with the amount in the check.

and

and Co., who were proved to be *Byers's* bankers, was in the possession of the petitioning creditor, and produced by him at the trial, with a cross marked on it; which cross, however, was unexplained. The bankrupt's papers had also, it appeared, fallen into his possession at the time of the bankruptcy. A clerk of *Sykes* and Co. proved, that 100*l.* was received from *Pole* and Co. on *Byers's* account the day after the check was drawn; and a clerk of *Pole* and Co. proved, that that amount was that day paid by them on account of the petitioning creditor. These clerks could only verify the entries to the above effect in the bankers' books, but were unable to recollect the identical check.

Vaughan and *Cross* Serjts., who showed cause against the rule, contended, that here was sufficient evidence for the jury to presume a loan of 100*l.* from the petitioning creditor to *Byers*, especially as the check had come back to the hands of the lender.

BEST. C. J. I am sorry that this objection must prevail against the justice of the cause, but no evidence has been given which will justify the jury in presuming the existence of the petitioning creditor's debt. All that distinctly appears towards raising such a presumption is the delivery of a check by *Smith* to *Byers*; for the mere circumstance of its coming back to the hands of *Smith* is not evidence that it has been paid, especially when there is no proof that it was ever in the hands of *Byers's* bankers; and when it is considered that *Byers's* papers fell into the hands of *Smith*, the clerk who paid the check ought to have been called.

The rest of the Court concurring, the rule was made Absolute.

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YRISARRI V. CLEMENT.

1. The Defendant having published imputations against the Plaintiff as envoy of the state of *Chili*, and the Plaintiff in a declaration for libel having stated as matter of inducement, that he was *envoy* of that state : Held, upon motion for a new trial, that the admission of these two facts upon the face of the alleged libel was sufficient proof of them to enable the Plaintiff to sustain his action.

2. An action of libel does not lie for any thing written against a party touching his conduct in an illegal transaction ; but for misconduct imputed to him in any matter independent of the illegal transaction, though arising out of it, an action lies.

3. Held, that the following passage, " The Plaintiff lost no time in transferring himself, together with 200,000*l.* sterling of *John Bull's* money, to *Paris*, where he now outtops princes in his style of living," did not impute to the Plaintiff having committed a fraud on the *English* nation.

THIS was an action for a libel. After the usual allegation of the Plaintiff's good character, the first count of the declaration proceeded, —

" And whereas, also, before the time of the committing the grievances by said Defendant in this count and the four next following counts mentioned, the said Plaintiff had been, and was appointed by certain persons exercising the powers or authority of government in a certain republic or state in parts beyond the seas, to wit, in the republic or state of *Chili*, in *South America*, to the office or station of *envoy* extraordinary and minister plenipotentiary from the said republic or state of *Chili*, to and at the courts of *Europe*, and amongst others to the court of this United Kingdom, to wit, &c.

" And whereas before the time of the committing the grievances by said Defendant in this count and the four next following counts mentioned, the said Plaintiff had been and was authorized, empowered, and directed by said persons exercising the powers or authority of government in the said republic or state of *Chili*, in *South America*, to negotiate a loan or loans for the service of said republic or state of *Chili*, to wit, at, &c.

" And whereas, also, before the committing of the grievances by said Defendant in this count and in the four next following counts mentioned, to wit, on the

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1st *January* A. D. 1820, the said Plaintiff had come to and arrived in this country, and had become and was resident therein, to wit, at *London* aforesaid, in the parish and ward aforesaid :

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“ And whereas, also, before the committing of the grievances by Defendant in this count and in the four next following counts mentioned, to wit, on the 1st *July* 1822, the said Plaintiff, by virtue and in exercise of the said power and authority conferred on him by the said persons exercising the powers or authority of government in the said republic or state of *Chili*, in *South America*, had entered into, made, and concluded, for and on the part of said republic or state of *Chili*, a contract with certain persons, to wit, *John Hullett* and *Charles Widder*, carrying on trade and commerce in the city of *London* by and under the style and firm of *Hullett, Brothers, and Co.*, for raising a certain loan of money, to wit, a loan for 1,000,000*l.* sterling money of this kingdom, for the service of said republic or state of *Chili*, by the sale of certain bonds or obligations, to wit, bonds or obligations of and on the part of the government of the said republic or state of *Chili*, which said bonds or obligations had been and were signed by said Plaintiff as envoy extraordinary and minister plenipotentiary for the said republic or state of *Chili*, and by virtue and in exercise of the said power and authority conferred on him for that purpose as aforesaid, and had been and were issued by him the said Plaintiff to the said Messrs. *Hullett, Brothers, and Co.*, and had been and were sold and disposed of by and through the agency of them the said Messrs. *Hullett, Brothers, and Co.*, to divers subjects of this kingdom, as the buyers and purchasers thereof, to wit, at *London* aforesaid, in the parish and ward aforesaid :

“ And whereas, also, before the time of the committing of the grievances by the said Defendant in this count and the four next following counts mentioned,

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one *John Hullett*, being one of the partners in the said house or firm of Messrs. *Hullett, Brothers, and Co.*, had been and was appointed by certain persons exercising the powers or authority of government in a certain other republic or state in parts beyond the seas, near or neighbouring to the before mentioned republic or state of *Chili*, in *South America*, that is to say, in the republic or state of *Buenos Ayres*, in *South America*, consul-general for the said republic or state of *Buenos Ayres*, in and towards this United Kingdom, to wit, at *London* aforesaid, in the parish and ward aforesaid:— yet the said Defendant well knowing all and singular the premises aforesaid, but contriving and maliciously intending wrongfully and unjustly to hurt, injure, and prejudice, and damnify the said Plaintiff in his said good name, fame, credit, and reputation, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this kingdom, and cause it to be suspected and believed by those neighbours and subjects that he had been and was guilty of fraud, and otherwise to hurt, injure, prejudice, and damnify him, heretofore, to wit, on, &c., at, &c., did falsely and maliciously print and publish, and cause and procure to be printed and published of and concerning the said Plaintiff, and of and concerning the matters aforesaid, a certain false, scandalous, malicious, and defamatory libel in a certain public newspaper, commonly called or known by the name of the “*Morning Chronicle*,” in the form of a letter purporting to be written to the editor thereof, containing therein, amongst other things, the false, scandalous, malicious, and defamatory matter following, of and concerning the said Plaintiff and of and concerning the matters aforesaid, that is to say, “I (meaning the person purporting to be the writer of said letter) would ask another question not irrelevant on the present
 sent

sent occasion: why did the appointment of consul-general (meaning the said appointment of consul-general for the said republic or state of *Buenos Ayres*, in *South America*,) to *England* fall on the person alluded to? (meaning the said *John Hullett*.) It would not surely be owing to any approbation of his (meaning the said *John Hullett's*) conduct in meddling with the affairs of a neighbouring state (meaning the said republic or state of *Chili*, in *South America*,) which state (meaning the said republic or state of *Chili*,) without being in want of money, or even asking for it, this *London* agent (meaning the said *John Hullett*,) saddles with a debt of one million of pounds, taken out of *English* pockets, for the benefit in reality of himself (meaning the said *John Hullett*,) and the *Creole Spaniard* (meaning the said Plaintiff,) who acted the part of plenipotentiary to the *Stock Exchange* in that drama (meaning and insinuating thereby that the said Plaintiff colluding with the said *John Hullett* to obtain money fraudulently in the matter of the said loan for one million of pounds for the service of the said republic or state of *Chili*, in *South America*, had defrauded the *English* subjects of this kingdom). The latter worthy (meaning the said Plaintiff,) lost no time in transferring himself, together with his hundred thousand pounds sterling of *John Bull's* money to *Paris*, (meaning and intending thereby that the said Plaintiff had fraudulently obtained two hundred thousand pounds sterling of the money of the *English* subjects of our sovereign lord the king, and had fled from this country with the same,) where he (meaning the said Plaintiff,) now outtops princes in his (meaning the said Plaintiff's) style of living. This notorious transaction, that will occupy a prominent place in the annals of stock-jobbing fraud, (meaning and insinuating thereby that said Plaintiff had colluded with the said *John Hullett* in the matter of the said loan raised for the said republic or

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state of *Chili*, in *South America*, and had defrauded certain *English* subjects of this kingdom,) ought to have warned official men of the *South American* state, alluded to in *Mr. Canning's* speech, against trusting the management of their affairs in *England* to the same hands; but they have determined otherwise, and here are the consequences of their acting in contempt of public opinion. I (meaning the said person purporting to be the writer of the said letter,) write this not for the *English* readers of the *Chronicle*, but for the *South Americans*; they will not be at a loss to supply the names here omitted."

The four following counts set out the same libel, averring that the Defendant had falsely and maliciously published it of and concerning the Plaintiff *and the matters aforesaid*, and the various innuendoes to the words "the latter worthy lost no time in transferring himself together with 200,000*l.* sterling of *John Bull's* money to *Paris*, where he now outtops princes in his style of living," were,

That the Plaintiff in the matter of the said loan for the republic or state of *Chili*, had defrauded *English* subjects of 200,000*l.* sterling :

That he had acted fraudulently in the matter of the loan raised for the republic or state of *Chili* :

That he had fraudulently obtained 200,000*l.* from *English* subjects :

That he had committed a fraud.

The sixth, seventh, eighth, and last counts contained no allusion to the introductory matter of the first count, and merely set out the above words, with the following innuendoes :

That the Plaintiff had fraudulently obtained 200,000*l.* of the money of *English* subjects, and had fled therewith out of the kingdom :

That he had left this country with 200,000*l.* fraudulently obtained from *English* subjects :

That

That he had defrauded *English* subjects of 200,000*l.*
That he had committed a fraud.

At the trial before *Best C. J.*, *London* sittings after *Michaelmas* term, the Plaintiff proved the seal of the government of *Chili*, as also that that country consisted of three provinces, two and a half of which were under the authority of the director *Don Bernardo O'Higgins*, who, with the other members of the government, made and enforced the laws. The remaining half province was in the hands of the old *Spaniards*. The Plaintiff's appointment as envoy to all the courts of *Europe* was then put in, signed by the director, as well as an authority to raise money for state purposes. A deed executed at *Paris*, and deposited in the Bank of *England*, was next put in, by which the revenues of *Chili* were charged with the payment of the loan to be raised by the Plaintiff, and a bond, by which it appeared that some payments had been made.

Evidence was also given of the independence of *Buenos Ayres*, and of the seal of that country attached to the appointment of *John Hullett* as consul. The loan raised was to the nominal amount of one million, for which it appeared that the Plaintiff had only received 675,000*l.*

After proof of the publication by Defendant, it was objected on his part, that the Plaintiff had failed to prove the allegation in the declaration, that *Chili* and *Buenos Ayres* were states; the present governments of those countries not having been recognized by the government of this. Upon which the Lord Chief Justice observed, that there were three sorts of foreign states; first, states that were merely acknowledged as sovereign independent states; secondly, states in connection, or such as were connected with us by existing treaties; thirdly, sovereign states neither in connection with us nor acknowledged by our government, such as

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*Japan, Siam, and many other states which conquest and commerce have made us acquainted with. In cases relative to the two first-mentioned states, it is only necessary to prove that our government has acknowledged them or treated them as sovereign independent states. In many cases it would be unnecessary even to adduce this proof, for the great states of the world are taken notice of in acts of parliament made for confirming treaties and regulating the intercourse with them, and of such states the courts of law take judicial notice. The existence of unacknowledged states must be proved by evidence. The proof necessary to establish the fact of the existence of such states is, that they are associations formed for mutual defence, who acknowledge no other authority but that of their own government, observe the rules of justice to the subjects of other states, live generally under their own laws, and maintain their independence by their own force. It makes no difference that the new state formed part of another acknowledged state; states may be legitimately divided. The states of *Holland* and *America* were treated as sovereign states by the nations of *Europe* before their independence was acknowledged by *Spain* and *Great Britain*. The considering separated portions of an ancient state as new and independent states, does not legalize the conduct of *British* subjects who assist them in the contest with their old governments, such governments being in alliance with *Great Britain*. His Lordship, however, reserved the point for the consideration of the Court.*

It was then objected, that the raising of loans for a state at war with a state which was in friendly relation with the government of this country, was an illegal transaction, and that the Defendant was not responsible for any thing said of the Plaintiff touching his conduct in the illegal transaction. The Chief Justice, however, overruled the objection, thinking the Plaintiff had been attacked in his private character independently of the political

political transaction, and a verdict was found for him on the whole declaration, with 400*l.* damages.

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Taddy Serjt. on the two objections above stated, obtained a rule *nisi* for a nonsuit or a new trial; and for an arrest of judgment, on the ground that the innuendo in the eighth count was more extensive than the words would bear. It might be said innocently of any person, that he set off to *Paris* with 200,000*l.* of *John Bull's* money; and if that count were bad, the verdict in a case for libel having been taken in all the counts, could not be entered up on a single one, *Holt v. Schofield*. (a) [The objection that *Chili* could not be considered as a state until recognized as such by the government of this country, and that unless it were so recognized, the Plaintiff could not in a *British* Court allege his mission as envoy, or his authority to raise a loan, was urged at great length and with great learning by *Taddy* and *Spankie* Serjts. for the Defendant; but as the Court came to no decision on the subject, holding, that for the purposes of this action the Defendant had sufficiently admitted those points in the libel itself, it is unnecessary to report the argument.]

The objection, that the Plaintiff having been engaged in an illegal transaction, could not recover damages for any thing said of his conduct in that transaction, which was sustained chiefly on the authority of *Hunt v. Bell* (b), was answered by the assertion, that the libel contained imputations on the Plaintiff, on topics *dehors* the illegal transaction; his alleged absconding to *Paris* with the money raised having nothing to do with the illegality of raising it.

BEST C. J. A motion has been made in this case for a nonsuit or a new trial, and the ground stated for the

(a) 6 T. R. 691.

(b) 1 Bingb. 1.

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first is, that the declaration has alleged there is such a state as *Chili*; that the Plaintiff has been appointed minister plenipotentiary from that state to this country; that there is such a state as *Buenos Ayres*; that Mr. *Hullett* has been appointed consul general for that state; and that there has been no proof of these allegations. I decided at the trial, that the existence of those states was proved, and I have now the satisfaction to state, that all my learned brothers fully concur with me, in thinking there is no foundation for the objection which has been raised on this head. The statement in the declaration was mere inducement, and it is sufficient if what is so stated has been admitted by the Defendant on the face of the libel itself. On the face of this libel the Defendant admits that there are such states as *Chili* and *Buenos Ayres*; and it was proved at the trial, that the Plaintiff had been appointed minister plenipotentiary for the first, and Mr. *Hullett* consul-general for the second. It appears to us all, that the allegations are made out.

The second objection was, that the Plaintiff could not recover, as the loan which he came to negotiate was illegal, and the Plaintiff, it was said, could maintain no action arising out of a transaction which was itself contrary to law.

The case of *Hunt v. Bell* I most fully agree to, and if I then had had the honour of a seat in this Court, I should have decided in the same manner, for I think that where a man complains of a libel written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to his complaints; but it appeared to me at the trial, and my opinion is now confirmed by that of my learned brothers on the bench, that if a man is guilty of an illegal transaction, fraud *ultra* that transaction is not on that account to be imputed to him; or, in other words, if a man is guilty of borrowing money in a manner which the law has forbidden,

bidden, he is not, therefore, to be charged with committing a fraud upon the *English* nation.

Another point was made at the trial, which point I did not save for the consideration of the Court, and therefore no nonsuit can be entered. I thought the libel imputed to the Plaintiff the having committed a fraud upon the *English* nation. On re-considering the imputations in this libel, and the innuendoes in the declaration, I am of opinion the libel imputes to the Plaintiff no fraud whatever upon the *English*. It is a rule of law essential to the liberty of the press, that in all actions for libel every part of the paper must be read, in order to collect its meaning. On reading this libel over for that purpose, I think that the Plaintiff is charged with defrauding the people of *Chili*, and not, as is alleged in the innuendoes, with defrauding the people of *England*.

His Lordship here read the libel in proof of his opinion, and when he came to the passage, "I write this not for the *English* readers of the *Chronicle*, but for the people of *South America*;" he observed, this is most important to shew the meaning and object of the libel. The insinuation is, that you (the Plaintiff) have raised a loan which the people of *Chili* do not want, and have applied it to your own private purposes, and that insinuation means, that the fraud is committed upon the people of *Chili*, and not on the people of *England*. If I lend a man money, that money may be said to be taken out of my pocket, but if the agent who receives it from me for the borrower, spends it instead of delivering it over to the borrower, he does not cheat me, but the borrower. I am at present of opinion, that the innuendo, "meaning thereby that the said Plaintiff had cheated *John Bull*," is not made out, since that is not really the meaning of the passage.

As this distinction was not attended to at the trial, it is fit it should go down again.

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Mr. Serjt. *Vaughan* submitted that this was an entirely new point, and that counsel should have been permitted to be heard upon it.

The Lord Chief Justice and Mr. Justice *PARK*, however, were of opinion, that if the judge who tried the cause was satisfied that sufficient attention had not been paid to an important part of the case, and the Court agreed with him in that opinion, the cause must go down to another trial. The Court was not finally deciding, but putting the case in a state for further enquiry.

Rule absolute for a new trial.

RULE OF COURT.

Hilary Term, 6th & 7th G. 4.

IT IS ORDERED, That all prisoners who have been or shall be in custody of the warden of His Majesty's prison of the *Fleet* for the space of six months after they are supersedeable, although not superseded, shall be from time to time discharged out of the custody of the said warden, by the said warden, as to all such actions in which they have been or shall be supersedeable; and that no prisoner shall be entitled to any room in the said prison by reason of seniority, except from the time of his being charged in the actions in which he is not supersedeable.

By the Court.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

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IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Seventh Year of the Reign of GEORGE IV.

REDPATH v. WILLIAMS.

April 12.

THE Defendant having avoided the service of a writ *of capias ad respondendum*, by causing her servant to say that she was ill, or not at home; the Plaintiff's attorney having learned from her counsel that she proposed to persevere in avoiding the service, enclosed a copy of the writ in a letter, and put it into the post, where he found it afterwards remaining, the Defendant when it was offered her by the postman having refused to take it in.

Sending processes by the post in a letter which the Defendant refuses to receive, is not good service, although the refusal may have been wilful, and accompanied with a long avoidance of service.

He then filed an affidavit of these facts, entered an appearance under the statute, and signed interlocutory judgment.

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Wilde Serjt. obtained a rule *nisi* to set aside this judgment for irregularity, against which rule

Peake Serjt. shewed cause on the authority of *Aldred v. Hicks (a)*, where it was holden, that if any person who has corresponded on the subject of an action, wilfully refuse to receive process inclosed in a letter by the post, it shall be deemed good service, though he never read the letter; but

The Court held the service insufficient, and made the rule absolute, though without costs, as they thought the attorney might have been misled by the case cited.

Rule absolute.

(a) 5 *Taunt.* 186.

April 12.

BECKWITH v. CORRAL and Another.

In an action by the owner of a lost bill of exchange against a banker who had cashed it to a stranger: Held, that the jury were properly directed to consider whether the Plaintiff had used due diligence in appraising the public of his loss, and whether the Defendant had acted with good faith and sufficient caution in the receipt of the bill.

TROVER for bills of exchange. At the trial before *Best C. J.*, *London* sittings after *Hilary* term last, it appeared that the Plaintiff had on the 29d of *December* 1825, been robbed of his pocket book, containing a bill dated *November 21st*, 1825, drawn by bankers at *Canterbury*, to the order of *Mr. H. Meredith*, upon *Remington and Co.*, bankers, *Lombard Street*, payable thirty days after sight, indorsed by *Meredith* and accepted by *Remingtons*.

On the 26th of *December* the Plaintiff advertised the loss of his pocket-book, but said nothing of the lost bill.

On

On the 30th he gave *Remingtons* notice of it, and requested them to stop the bill. In the advertisement, he stated that the contents of the pocket-book were of no use to any but the owner.

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The Defendants were bankers at *Maidstone*. The bill was presented to their clerk on the 29th of *December*, by two young men who were strangers to him. One of them said he was the son of the *indorser*; and the amount of the bill was thereupon paid in notes of the Defendant's bank.

The Chief Justice left it to the jury to consider whether the Plaintiff had used due diligence in apprising the public of his loss, and whether the Defendants had acted with good faith and sufficient caution in the receipt of the bill.

The jury having found a verdict for the Defendants,

Wilde Serjt. moved for a new trial, on the ground that the jury had been mis-directed.

He argued that the Defendant's title to retain the bill must depend wholly on the question whether or not they had acted with caution and good faith. The utmost negligence on the part of the Plaintiff would not entitle them to retain the bill, if they had conducted themselves incautiously or with bad faith. But according to the manner in which the question had been left to the jury, they might have found a verdict against the Plaintiff on the ground that he had not used sufficient diligence, although they might at the same time have been satisfied that the Defendants had acted incautiously: and it did not appear upon which ground the verdict was actually given; but

The Court thought that the Plaintiff was bound to give notice of his loss as extensively as possible. That so far from having done so in the present instance, he had

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had rather misled than assisted parties to whom the stolen notes might be offered, by stating that the contents of the pocket-book were of no use to any but the owner ; they therefore rejected the application, and *Wilde*
 Took nothing.

April 13. ODDIE, Demandant ; FOSTER, Tenant ; Earl of
 PLYMOUTH, Vouchee.

Recovery.
 Amendment.

A PART of the premises named in the deed to lead the uses had been omitted in the copy of the *præcipe* which precedes the warrant of attorney.

Bosanquet Serjt. moved to amend by inserting the words omitted. But the Court said they could not apply the warrant of attorney to premises not named in the *præcipe*, and refused the amendment.

April 17.

TOOTH v. BAGWELL.

THIS was a trial at bar of a writ of right ; the *demi* mark having been tendered,

Vaughan Serjt. on the part of the tenant contended, that the Demandant ought to begin by shewing the seisin of his ancestor. In *Tyssen v. Clark* (a) it did not appear that the *demi* mark had been tendered ; but

(a) 3 *Wils.* 541.

The Court held that the tenant must begin. *Burrough J.* referred to a cause of *Luke v. Harris*, tried at *Exeter*, and *Gaselee* to *Gatton v. Harvey*, tried at *Dorchester*, in which this point had been expressly determined.

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v.

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JARVIS v. DEAN.

April 18.

THE Plaintiff declared in case, to recover damages for an injury, occasioned by his falling one dark night into an area, which the declaration alleged the Defendant wrongfully and negligently to have left open, at a house which he possessed in the parish of *Islington*, and in, near to, and adjoining a certain street called *Barnsbury Row*, which street at that time was and still is "a common public street and highway for all the liege subjects of our Lord the King, to go, return, pass, and repass on foot every year, and at all times of the year, at their free will and pleasure."

Persons had for some years been in the habits of passing up and down a new unpaved and unfinished street, which terminated in fields, where other houses were built.

At the *Middlesex* sittings in this term before *Best C. J.*, the Plaintiff proved the injury as alleged in the declaration. It appeared, however, that the area in question belonged to one of two unfinished houses, standing in a new street leading from *White Conduit Street* to some fields, in which, also, there were houses; the street was neither paved nor lighted. The inhabitants had paid highway rates and paving rates. The road through this street communicated with a public road which passed over fields to *Highgate*, and had been used as a public road for four or five years.

A jury having found a dedication to the public, the Court refused to grant a new trial, which was moved for on the ground that this was not sufficient evidence of a dedication.

It was objected, on behalf of the Defendant, that the street being neither paved nor lighted, and leading only
to

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to the fields, a dedication to the public could not be presumed, so as to justify the allegation in the declaration that it was a common public highway.

The Chief Justice told the jury, that if they thought the street had been used for years as a public thoroughfare, with the assent of the owners of the soil, they might presume a dedication. A verdict having been found for the Plaintiff,

Vaughan Serjt. moved for a new trial, on the ground above stated. He cited *Roberts v. Karr (a)*, where it was holden there could be no partial dedication to the public; and if it appeared there had been no dedication as a carriage-way, a public right to a footway could not be acquired.

BEST C. J. I left the dedication as a question of fact for the jury. This had been a public thoroughfare for many years, and it did not appear that what had been done was done by the authority of the lessors of the houses only, without the acquiescence of the owner of the soil; and I therefore told the jury they might presume it was used with the assent of the owners of the soil. In *Wood v. Veal (b)* the road was only used by the tenants of particular houses. There was no thoroughfare, and there were circumstances to show that the owners of the soil never had assented to the way being used as a public road. There were no such facts in the present case; on the contrary it was beneficial to their property that there should be a public approach to this street from the public roads at both ends of it. As it had been used for four or five years as a public road, the jury were warranted in presuming that it was used with the full assent of the owners of the soil. The jury

(a) 1 Camp. 262.

(b) 5 B. & A. 454.

were therefore justified in the verdict they gave, and there is no pretence for the present motion.

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The rest of the Court concurred, and *Vaughan*
Took nothing.

(IN THE EXCHEQUER CHAMBER.)

TAYLOR v. J. WILLANS.

April 19.

JOSEPH WILLANS sued *Taylor* in debt, on the statute of *Anne*, "as well for the poor of the parish of *St. James*, in the county of *Middlesex*, as for himself;" and alleged, "that one *William Willans*, at the parish of *St. James* in the county of *Middlesex*, did at one and the same sitting, by playing at a certain game called *Rouge et Noir*, lose to the Defendant a large sum of money, to wit (50*l.*), and did then and there pay the same to the said Defendant."

Averment in a declaration on the gaming act, that the party lost to the Defendant by playing at *rouge et noir* :

The Plaintiff below having recovered, and judgment having been given for him in the Court of King's Bench, the Defendant below brought error into the Exchequer Chamber, and assigned as causes of error, that there are two parishes of *St. James* in *Middlesex*, — *St. James Clerkenwell*, and *St. James Westminster*; and that it did not appear which was meant. Also, that it was not sufficiently averred that *William Willans* lost money to the Defendant below at one and the same time, by playing *with* him, or that the Defendant below played at all,

Held, sufficient on error, without alleging the money to have been lost by playing *with* him.

2. The Plaintiff having sued *qui tam*, alleged the loss at the parish of *St. James*, in the county of *Middlesex* :

Held, sufficient in error, although in *Middlesex*

there are the parishes of *St. James Clerkenwell* and *St. James* in the liberty of *Westminster*.

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or betted on the sides of those who did play, so as to bring the case within the 9 *Ann.* c. 14. s. 2.

Brodrick for the Defendant below. First, as a moiety of the penalty goes to the poor of the parish, it is essential that it should distinctly appear on the pleadings in what parish the offence was committed. But that does not appear on this declaration, if the Court takes judicial notice that there are two parishes of *St. James* in the county of *Middlesex*; and it must be intended that such notice will be taken of the fact, when there are many public acts of parliament which recognize the parish of *St. James* in the liberty of *Westminster*, and others, such as 28 *G. 3.* c. 10., 30 *G. 3.* c. 64., which recognize *St. James Clerkenwell*.

Unless the Court will take judicial notice of this fact, the money may never be obtained by either parish; for it would be no variance to describe either of them as *St. James*. In the cases in which parishes have been holden to be misdescribed, the variance has usually consisted in a mis-statement of the name of the patron saint, as in *Wilson v. Gilbert* (a), *Harris v. Cooke*. (b)

Secondly, the 9 *Ann.* c. 14. s. 2. enacts, "That from and after 1st *May* 1711, any person or persons whatsoever who shall at any one time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons, so playing or betting, in the whole the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof, the person or persons so losing, and paying and delivering the same, or any informer, may recover it by suit."

(a) 2 *B. & P.* 281.

(b) 8 *Taunt.* 539.

There-

Therefore, where *A.* plays with *B.* and bets with, and loses on the bet to *C.*, the statute does not apply. And, for aught that appears on the declaration, such might have been the case in the present instance. Now, a party who sues on a statute must shew clearly that his case falls within it. *Com. Dig. Action on Stat. A. 3. Pleader, C. 6.* It must appear that the party named was either playing with the Defendant or betting on the game, and in such a case nothing can be presumed after verdict that is not expressly stated. *Lynhall v. Longbottom (a), Spieres v. Parker (b), Rushton v. Aspinall (c), Butt v. Howard. (d)*

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Patteson, contra, was stopped by the Court on the first point: on the second he urged, that one party could not lose money to another by playing at cards, unless he played with him.

Per Curiam. The declaration is sufficient. It does not appear by any act of parliament, that there are two parishes of *St. James*, in *Middlesex*. It appears that there is a parish of *St. James Clerkenwell*, and another parish, sometimes called *St. James*, and sometimes *St. James* in the liberties of *Westminster*. Looking at the statutes, therefore, there is only one parish called *St. James*.

As to the second objection, it sufficiently appears that the party lost the money to the Defendant by playing; and if lost to the Defendant by playing, it must have been lost by playing with him, for if the party had betted with the Defendant, he would have lost by betting, and not by playing.

Judgment affirmed.

(a) 2 Wjls. 36.
(b) 1 T. R. 141.

(c) Doug. 679.
(d) 4 B. & A. 655.

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April 21.

FORSTER and two Others v. LAWSON.

Persons in partnership as bankers may, without shewing the proportion of their respective shares, join in an action for a libel against them in respect of their business.

CASE for libel. The declaration stated, that the Plaintiffs at the time of the publishing of the libels were bankers in partnership together at *Cambridge*, and were in good and solvent circumstances, and had never stopped payment, nor, until the time of the publishing the libel, had been suspected to be in bad and insolvent circumstances, or to have stopped payment, but, until that time, were always in good credit: By means of which premises the Plaintiffs, before the publishing the libel, had acquired, and were then daily acquiring, great gains and profits from their trade: Yet the Defendants, contriving to injure the Plaintiffs in their trade, and to cause it to be suspected and believed that the Plaintiffs were in bad and insolvent circumstances, and that the Plaintiffs as such bankers as aforesaid had stopped payment, and thereby, and otherwise, to injure the Plaintiffs in their trade, falsely and maliciously published, and caused and procured to be published, in a certain public newspaper called "*The Times*," the following false, scandalous, malicious, and defamatory libel of and concerning the Plaintiffs in their trade and business: (that is to say,) "Though the accounts from some parts of the country respecting the renewal of confidence in the local banks are favourable, yet the list of failures of such establishments, intelligence of which reached town yesterday, is of fearful extent. The following are the names of some of the sufferers: The *Hinckley* bank of *Sansome* and Co., the bank of *Jervis* and Co. of the same place, being the only establishments

blishments in that town; the *Southampton* bank of *Kellow* and Co.; the *Peterborough* bank of *Simpson* and *White*; the *Wisbeach* bank of *James Hill* and Son; the *Kingston* (*Surrey*) bank, the only one in the town. At *Cambridge*, it is said, that four, out of the six, banks in that town have stopped payment, viz., that of *Thomas Fisher* and Son; that of *J. Mortlock*, Esq., and Sons; that of *Horlock* and Co.; and that of *R. E.* and *R. Fosters*:" (meaning the said Plaintiffs in their said trade and business). "The letters from *Cambridge* state that the graduates and heads of colleges, so far from adding to the alarm on this occasion, as is said to have been recently the case among the members of another learned body, interfered in the most prompt manner, and tendered their assistance in a very large sum, provided that by such means the evil could be averted; but the assistance was declined, because there was no prospect of its proving effectual:"

And also the false, scandalous, malicious, defamatory, and libellous matter following of and concerning, amongst others, the Plaintiffs in their trade and business; (that is to say,) "Since writing the above we understand that an express has arrived from *Cambridge*, with information that the whole of the banks in that place" (meaning, amongst others, the Plaintiffs in their trade and business,) "have suspended their payments, the partners of the respective firms having met together, and mutually adopted a resolution to that effect, but intimating amongst their friends a hope the suspension would only be temporary:"

By means of the publishing of which said several false, scandalous, malicious, and defamatory libels by the Defendant of and concerning the Plaintiffs in their trade and business as aforesaid, the Plaintiffs not only have been and are greatly injured in their trade and business, and have been and are suspected and believed

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to have been insolvent, and to have stopped payment, but, also, divers, to wit, ten thousand promissory notes made by the Plaintiffs in the way of their trade and business for the payment by the Plaintiffs of divers sums of money, amounting in the whole to a large sum, to wit, the sum of 20,000*l.*, which before, and at the time of, the publishing the said several libels were outstanding and in circulation, and which, but for the publishing of the said several libels would have remained and continued outstanding and in circulation, were presented to the Plaintiffs for payment thereof, and the Plaintiffs were called upon, forced, and obliged to, and did necessarily pay and satisfy to the respective holders of such notes the several sums of money in such notes respectively specified, whereby the plaintiffs not only lost and were deprived of all the benefit and advantage which might and would have accrued to them from the said notes continuing outstanding and in circulation, but were put to great trouble and expence of their monies, to wit, to an expence of 2000*l.*, and suffered and sustained great loss, to wit, a loss of 2000*l.*, in and about the raising and procuring sufficient money to pay and satisfy the said several notes, and thereby, and otherwise, by means of the premises, the Plaintiffs have been, and are, greatly injured and damnified.

General demurrer and joinder.

Taddy Serjt. in support of the demurrer. First, The language complained of is not actionable: the inducement of the declaration alleges that the Plaintiffs have never been in insolvent circumstances, and have never stopped payment. But the Defendant has nowhere alleged against their insolvency or stoppage; he only mentions suspension of payment, which is compatible with the highest degree of solvency and mercantile credit.

Secondly,

Secondly, The Plaintiffs cannot join in an action of tort, unless they disclose a joint interest and joint damage: *Coryton v. Lithebye*, and Serjt. *Williams'* note thereto. (a) But these bankers may each have had very different interests in the firm, and each may have been damaged in a very different degree. A recovery in this joint action would be no bar to a separate action by each of the partners, for his share in the alleged damage. *Cooke v. Batchelor* (b) is the only case in which it has been holden that partners can sue for a libel on the conduct of a firm; and in that case it was abundantly manifest that the plaintiffs had sustained a joint damage: But,

Thirdly, Here it is not clear that the Plaintiffs have sustained any damage; the allegation of special damage contains no averment that the Plaintiff's notes were payable on demand, and when or to whom payable; and unless it appear that the Plaintiffs were under a legal obligation to pay them, they cannot legally be said to have sustained damage by paying them.

BEST C. J. An objection has been made to the declaration in this case, namely, that the action has been brought by three persons jointly, and that they could not properly join in such an action.

The general rule of law is, as laid down in the case in *Croke* (c), namely, that where several persons are charged with being jointly concerned in a murder, each of them must bring his separate action for it, and the reason is, that they have no joint interest to be affected by the slander. Where, however, two persons have a joint interest affected by the slander, they may sue jointly; and the case of *Cooke v. Batchelor* is not the first case which has determined this point.

In the note in *Saunders*, to which the Court has been referred, the learned editor states, that two joint tenants

(a) 2 *Wms. Saund.* 116 u.

(b) 3 *B. & P.* 150.

(c) *Cro. Car.* 513. *Smith v. Cooker.*

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or co-parceners might join in an action for slander of the title to their estate, and the form of the declaration in such an action is to be found in *Brownlow*.

This doctrine has also been recently considered and confirmed in the case of *Collins v. Barrett*, in which it was holden that two persons might bring a joint action for a maliciously holding them to bail, if the complaint in the declaration was confined to the expences which they were jointly put to in procuring their liberty.

It has been said, that notwithstanding the judgment against the Defendants in this action, if either of the Plaintiffs has sustained any separate damage, he may still maintain a separate action. I cannot see how there can be any separate damage. The business injured is the joint business, and the libel only affects the Plaintiffs through their business. If, however, a copartnership be libelled, and the libel contains something which particularly affects the character of one of that firm, I think a joint action may be maintained against the libeller, who would have less reason to complain of such proceedings than he would have if each partner brought a separate action for the injury done to the firm. Another objection raised by the Defendant's counsel is, that the Plaintiffs have not stated the proportion of interest which each respectively had in their joint business. It is not necessary for them to do so; with their several proportions the Defendant has nothing to do. Any compensation they may recover will belong to them generally, and it is nothing to the Defendant how it may be divided among them. It has also been urged that the words contained in the paragraph are not actionable. I have no hesitation in deciding, that to say of any bankers they have suspended payment, is actionable. For, what can be the meaning of such a statement, except that they are no longer solvent? Saying that a banker has suspended payment is saying that he cannot pay his debts. A temporary inability to pay debts is insol-

insolvency. The charge of suspending payment is a charge of insolvency. Such a statement will instantly bring all the creditors of a banking-house upon it, and completely stop their business by preventing any one from taking their bills.

But here special damage is stated, and I think correctly stated.

It has been objected, that the special damage is not set out with sufficient certainty. Even if that were so, advantage could be taken of it only by a special demurrer. In my opinion, however, the special damage is clearly and distinctly set out. The Plaintiffs state that they had a number of promissory notes outstanding and in circulation, and that in consequence of these libels they were called upon and forced and obliged to pay those notes; how or when, was not material, it being sufficient that they declare that they have thereby lost all the benefit and advantage which would otherwise have accrued to them in their trade and business, from the notes remaining outstanding and in circulation.

The declaration goes even farther; it states, that the Plaintiffs have suffered and sustained a great loss in raising and procuring sufficient money to pay and satisfy their several notes. It appears to me that the declaration is unobjectionable, and that the Plaintiffs are entitled to judgment.

PARK J. I fully concur in the judgment which has just been delivered.

I believe it to be clear law, that wherever slanderous words are spoken of partners in the way of their trade, they may maintain a joint action for them, though they do not state special damage. The case of *Cooke v. Batchelor* is unimpeached and unimpeachable; but there are other cases of good authority, which also establish the doctrine there laid down.

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The objection that it does not appear whether or not the notes paid by the Plaintiffs were due, is answered by the allegation that the Plaintiffs were forced and obliged to pay them.

It is not necessary to decide the question, whether a verdict recovered against the Defendant in this joint action, by all the partners, could be pleaded in bar to separate actions brought against him by each of the partners; but if the partners have been injured in their separate capacities, they have each a right to maintain his separate action.

Upon all the grounds which have been presented to the Court, I am clearly of opinion that this action is maintainable.

BURROUGH J. The action, in my opinion, is very properly brought, and will be productive of considerable benefit to the public, by teaching the conductors of newspapers to act with greater caution than they have recently displayed. It has been argued, that separate actions ought to have been brought, because the Plaintiffs had not each an equal interest in their business; but how can that be known to the Court? The case is precisely similar to that of *Cooke v. Batchelor*, and the declaration is sufficiently certain. No question can be agitated as to whether the special damage has been properly set out in this case; for I agree entirely with the Lord Chief Justice, that as the libel complained of reflected on the Plaintiffs in the way of their trade, the action is maintainable, without setting out any special damage.

GASELEE J. It seems to me that, in a case like the present, there is no distinction in the form of an action, whether it is brought for a firm consisting of many individuals,

dividuals, or of a single individual. I am of opinion that the demurrer cannot be supported.

Judgment for Plaintiff.

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The Mayor, Bailiff, and Burgesses of the
Borough of BERWICK-UPON-TWEED v. SHANKS.

April 22.

COVENANT by the lessors against the assignee of the lessee of a term in certain premises, which were alleged in the declaration to be "situate within the liberties of *Berwick-upon-Tweed*." The venue was laid in *Northumberland*. General demurrer and joinder.

In covenant against the assignee of the lessee of premises described in the declaration as situate within the liberties of *Berwick-upon-Tweed*, the venue cannot be laid in *Northumberland*.

Wilde Serjt. in support of the demurrer. The action being brought against the assignee of the term, is local, and the venue should have been laid in *Berwick-upon-Tweed*.

Peake Serjt. *contra*. The venue is well laid, it not distinctly appearing in the declaration that the premises are *not* in the county of *Northumberland*. There is no filacer for *Berwick-upon-Tweed*, and causes arising in that borough must be tried in *Northumberland*. *Rex v. Cowle*. (a) But at any rate it is sufficient upon general demurrer, if it does not appear upon the declaration that the premises are *not* in the county of *Northumberland*; and there is nothing on this declaration to shew that part of the liberties of *Berwick-upon-Tweed* are not in *Northumberland*. In the case of *Barker v. Damer* (b), which first decided that in covenant against

(a) 2 *Burr.* 834.

(b) *Cartb.* 182.

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the assignee of a term the venue is local, the Defendant pleaded to the jurisdiction of the Court, that the lands demised lay in *Ireland*, to which plea the Plaintiff demurred. In the *Bailiff of Lichfield v. Slater (a)*, the Defendant pleaded that the lands were situate in the city of *Lichfield* and county of the same city; which being traversed, *Willes C. J.* said, "If it had stood upon the declaration only, the objection would not have arisen, for the premises there are only said to lie in the city of *Lichfield*, and we cannot judicially take notice of the boundaries of counties."

In the *Mayor of London v. Cole (b)*, where the premises were in *Middlesex*, the venue was laid in *London*, and it was objected that it ought to have been laid in *Middlesex*. *Lord Kenyon* said, in answer, "It does not clearly appear that the land lies in the county of *Middlesex*."

Wilde. It does appear here that the premises lie within the borough. Within the liberties of the borough is within the borough, or the word "liberties" has no meaning. The decision in the *Mayor of London v. Cole* turned upon the statute of jeofails, and the defect was cured by verdict. *Barker v. Damer and Bailiffs of Lichfield v. Slater* shew that the venue is local in such an action as the present; and the books of practice furnish a well-known suggestion to be entered on the record in causes arising within the borough of *Berwick-upon-Tweed*.

BEST C. J. This action is undoubtedly local, because it arises on privity of estate, and not on privity of contract. The question, therefore, is, whether it appears on the declaration to have been brought in the wrong

(a) *Willes*, 431.(b) 1 *T. R.* 583.

county;

county; and upon examining the case of *Rex v. Cowle*, and the act of parliament 1 & 2 Jac. 1. c. 28., we think this is the case. *Berwick* was originally part of *Scotland*, and afterwards brought within the kingdom of *England*. But though it forms part of the kingdom of *England*, it is not within the county of *Northumberland*. The charter of the inhabitants of this town has been confirmed by act of parliament, and therefore we are bound to take judicial notice of it. They have courts within the borough; they have the return of all writs out of the courts at *Westminster*; and the sheriff of *Northumberland* has no jurisdiction in the borough. The case of the *Bailiffs of Lichfield v. Slater* is materially distinguishable from the present. In that case *Willes C. J.* said, he could not take notice that the city of *Lichfield* was co-extensive with the county of the city.

In the present case we must, under the act of parliament, judicially take notice that the liberties of *Berwick* are not in the county of *Northumberland*, and that the sheriff of *Northumberland* cannot enter them. As to the objection, that there is no filacer, a writ may issue to the bailiffs of the borough. Our judgment, therefore, must be for the Defendant.

Judgment for Defendant.

The Court afterwards gave the Plaintiff leave to amend on payment of costs.

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April 24.

WALLS v. ATCHESON.

Where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant: Held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year during which the apartments had been unoccupied:

Held, also, that by the admission of another tenant she dispensed with the necessity of a written surrender.

ASSUMPSIT for use and occupation.

At the *Middlesex* sittings before *Best* C. J. in this term, the case was as follows:

On the 14th *September* 1824, the Plaintiff let furnished apartments to the Defendant at sixty-five guineas for a year.

The Defendant paid one quarter's rent to the 14th *December*, and then quitted the lodgings.

The apartments remained vacant till the 9th *January*, twenty-six days, when the Plaintiff let them to another lodger, at a guinea a week. But in the beginning of *April* the Defendant's attorney paid the Plaintiff's attorney the sum of 7*l.* 5*s.*, which had been demanded of the Plaintiff in respect of the rent of the apartments.

The Plaintiff continued to let the apartments to other lodgers till the beginning of *July*; but failing to procure lodgers from that time till the 14th *September*, she sued the Plaintiff for 21*l.* 0*s.* 6*d.*, the sum requisite to complete sixty-five guineas for the year.

There being no evidence to shew that the Plaintiff had re-let the apartments on behalf of the Defendant, the Lord Chief Justice thought she had rescinded the contract with the Defendant, and directed a nonsuit.

Vaughan Serjt. now moved to set aside this nonsuit, and have a new trial, on the ground that nothing appeared in the facts of this case to discharge the Defendant from his original liability. The Plaintiff in re-letting the apartments had let solely on his account, and had received the rent to his use. He cited *Redpath v. Roberts*,

Roberts (a), in which it was holden that if a tenant abandon premises without notice, the landlord is not precluded from recovering the subsequent rent by putting up a bill at the window, and endeavouring to procure another tenant: also *Mollett v. Braine (b)*, in which it was holden that a lease from year to year cannot be surrendered to the lessor by parol, and that a tenant who quits in the middle of a quarter, under an oral licence from the landlord, is bound to pay rent to the end of the year.

But the Court thought that the Plaintiff having precluded the Defendant from occupying his apartments by letting them to another person, must be taken to have rescinded the agreement, and to have dispensed with the necessity of a surrender: that she ought to have given the Defendant notice, if her intention was to let the apartments solely on his account: and PARKE J. referred to the case of *Lloyd v. Crispie*, where the lessor, having consented to the introduction of another occupier, was holden to have no claim on the lessee, who was under covenant not to assign except with licence.

Rule refused.

(a) 3 Esp. 225.

(b) 2 Camp. 103.

RADENHURST v. BATES.

April 26.

AT the last *Warwick* assizes, before *Best C. J.*, the Plaintiff obtained a verdict for 250*l.*, on a declaration which stated that on the 14th day of *February* of them, one stage, on the road from *L* to *B*, and that, in case of default, one of them should sue the defaulter for a penalty which should be divided among the non-defaulters, held, that an action might be maintained on the agreement, against a defaulter, by the party so appointed to sue, and that the others need not join in the action.

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1825, at *Birmingham*, in the county of *Warwick*, by a certain agreement in writing, then and there made by and between Plaintiff and Defendant, together with one *George Cole*, one *Henry Wakefield*, one *John Scott*, and one *Thomas Emery*, it was declared that they whose signatures and places of residence were at the foot of the said agreement, subjoined thereby, mutually and reciprocally bound themselves, each to the other, under the conditions and restrictions thereafter recited, (that is to say,) they agreed in common accordance to forthwith establish a stage-coach, to be worked or conveyed by them respectively from *Birmingham* aforesaid, in the said county of *Warwick*, to *Liverpool*, in the county of *Lancaster*, and to be returned or conveyed over the same line of journey to *Birmingham*, in a manner and time of conveying the same as thereafter stated, each of them respectively thereby having described in writing against their signatures severally that part of the journey aforesaid which they and each of them agreed to horse and convey the said coach, and the time and manner of so doing, and they thereby mutually and reciprocally agreed each with the other that such statement against their respective signatures should be a part of that memorandum of agreement: then, for the better and more immediately carrying the object of that agreement into effect, they further mutually and reciprocally bound themselves each to the other to the following stipulated forfeitures or penalties, ranged with the specific condition to the said agreement attached, and that such forfeitures or penalties respectively should, and it was thereby severally agreed, be paid as liquidated damages; and that Plaintiff should receive all and every of such forfeitures and penalties or penalty that might accrue accordingly, and in default of payment by any of the party or parties to the said agreement, that Plaintiff might and was thereby authorized and empowered by them mutually to sue in legal process for the same; and that the amount of such forfeiture, penalty,

penalty, or penalties, should be divided amongst the parties to that agreement who should not have subjected themselves to any such forfeitures, penalty, or penalties, as aforesaid, to the exclusion of any and every defaulter under the circumstances aforesaid, as to sharing in any part thereof. And it was thereby severally and conjointly agreed, first, that every party or person to the said agreement who should not be ready at the stipulated time of commencing to work and convey the stage-coach intended to be established as aforesaid over that part of the journey that he thereby undertook and agreed to horse and convey the said coach, and did not horse and convey the same accordingly, should forfeit the sum of 50*l.*, to be recovered and applied as thereinbefore recited and stipulated. And it was thereby further mutually and reciprocally agreed that such stage-coach or coaches should commence to be conveyed over the said journey on *Monday* the 21st day of *March* then ensuing, that is, two coaches daily, and every day, the one to leave *Birmingham*, and the other *Liverpool*; and that the said journey should be performed each way in thirteen hours and a half, the proportion of the said time assigned to each, being attached in writing against the signature of each proprietor. And in order to preserve the good faith indispensable to the well-doing of the proprietors of the said coaches, it was mutually and reciprocally agreed by each with or to the other, that neither of them should directly or indirectly be concerned in or promote the interests of any other coach whatever, that might be worked from the two extremities, namely, from or to *Birmingham* and *Liverpool*, but that their interest and best efforts should be applied to the coach then in contemplation, and agreed to be established, and for any and every violation of such good faith, the person or persons respectively should forfeit as a penalty 200*l.*, to be re-

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covered and applied as in such cases theretofore stipulated. And it was further mutually and reciprocally agreed by the parties to the said agreement that there should be three coachmen and two guards employed on the said coaches; and it was further agreed by the parties that for officing the coach at each extremity, including stationery, books, lights, porters, and clerks, one guinea should be allowed at the *Birmingham*, and one guinea at the *Liverpool* end weekly, and deducted from the earnings of the coach in accounts in progress; and it was further mutually and reciprocally agreed by the parties aforesaid, each with the other, that no party or person to the said agreement should cease to convey the said coach, or impede it on its journies by not conveying or causing it to be conveyed over his proportion of the journey, agreeable to his undertaking, under the forfeiture of 100*l.* liquidated damages to be paid by him, to be applied in manner aforesaid; that is, in the understanding of coach phraseology, he should not take off his horses, unless he should give three months' notice in writing previously to the proprietors severally of his intent so to do; and that all the penalties should, and it was severally agreed might be retained by Plaintiff out of any money that might come to his hands on account of the person or persons subject to such penalty or penalties. And Plaintiff further saith, that the signatures at the foot of the said agreement subjoined, and the several parts of the said journey which the parties signing the said agreement, and each of them, agreed to horse and convey the said coach, and which were described in writing against the signatures, were as follows, that is to say, *Charles Radenhurst* (the Plaintiff) from *Birmingham* to *Wolverhampton*; *George Cole* from *Wolverhampton* to *Stafford*; *Henry Wakefield* from *Stafford* twenty miles further towards *Liverpool*; *John Scott* the ground from *Liverpool* to *Northwick*; *Thomas Emery* from

from *Sandwich* to *Northwick*, eleven and half miles, and back; *M. Bates* (the Defendant) fourteen miles from *Hanley* to *Sandback* and back, and two hours to work the same. And the said agreement being so made, afterwards, to wit, on, &c. at, &c. in consideration thereof, and that Plaintiff, at the special instance and request of Defendant, had then and there undertaken and faithfully promised Defendant to perform and fulfil the said agreement in all things in his part and behalf to be performed and fulfilled, Defendant undertook, and then and there faithfully promised Plaintiff to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled. And Plaintiff further saith that afterwards, to wit, on, &c. at, &c. it was stipulated and agreed by and between the said parties to the said agreement, that the time for commencing to work and convey the said coach over that part of the said journey over which Defendant so undertook and agreed to horse and convey the said coach, should be the 21st day of *March* in the year aforesaid, and that afterwards, to wit, on, &c. the said stage-coach on its said journey from *Birmingham* to *Liverpool* arrived at *Hanley* aforesaid, for the purpose of being then conveyed by Defendant to *Sandback* aforesaid, being his proportion of the said journey as in the said agreement mentioned, to wit, at, &c. and that Defendant was then and there duly required to convey the said stage-coach from *Hanley* aforesaid to *Sandback* aforesaid accordingly; yet Defendant, not regarding the said agreement, nor his aforesaid promise and undertaking, was not ready at such stipulated time to convey, nor did, nor would, when so required, convey the said coach from *Hanley* aforesaid to *Sandback* aforesaid, but then and there wholly refused so to do, contrary to the tenor and effect of the said agreement, and of his aforesaid promise and undertaking; by means of

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which said several premises, Defendant afterwards, to wit, on, &c. at, &c. became liable to pay to Plaintiff the said forfeiture of 50*l.* liquidated damages to be applied in manner in the said agreement mentioned, when he should be thereto afterwards requested.

There was a further breach charging the Defendant with having promoted the interests of another coach.

Vaughan Serjt. moved for a rule to shew cause why the judgment should not be arrested, on the ground that the consideration alleged for the Defendant's promise was a promise by the Plaintiff, whereas, upon examining the agreement, the consideration appeared to be a promise or engagement of the Plaintiff and several others with whom in effect the Defendant was a partner under the agreement, and, therefore, not liable to be proceeded against at law; that at all events all the other parties ought to have joined in the action; and also that there was no sufficient allegation of performance of the Plaintiff's part of the contract.

A rule *nisi* having been granted,

Taddy and *Adams* Serjts. shewed cause. Each of the parties to this instrument agrees to be liable to all the rest, and empowers one to sue; and however necessary it might be that all should join or be joined in a suit as against strangers,—as among themselves, none can object to a proceeding pursuant to his own agreement. Such an agreement constitutes the only mode by which any one of them can be prevented from releasing another from the consequences of a violation of his contract. Each agrees with the other, (not the others), respectively; each has a separate interest, and each is prohibited from doing certain acts in their nature several.

Such

Such an agreement is clearly valid; *Davies v. Hawkins* (a), *Owston v. Ogle* (b), *Barton v. Hanson* (c); and performance on the part of the Plaintiff is sufficiently alleged in the averment of the arrival of the coach at the place at which the Defendant was to horse it.

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Vaughan, in support of the rule, urged in addition to the objections started on obtaining the rule *nisi*, the want of reciprocity in the agreement. If the Plaintiff were a defaulter, how were the other parties to sue him?

Cur. adv. vult.

BEST C. J. who gave the judgment of the Court, (after stating the declaration), said,

Several objections have been made to this declaration in arrest of judgment. First, it has been insisted that this agreement makes the parties to it partners, and, therefore, if any of them have any claims against the others, they must go into a court of equity. What is sought to be recovered by this action is not partnership property; the Plaintiff and the Defendant are not tenants in common of it; the Defendant has no interest in it. It is a penalty to be paid by the Defendant to the Plaintiff for the use of the other contracting parties, the Defendant himself being by the agreement expressly excluded from any share of it. There are no accounts to be settled before this claim can be decided, and, therefore, no one reason why this case may not be disposed of in a court of law, or why the parties should be subjected to the expense and delay that must attend a suit in equity. The courts of law should be careful not to narrow their jurisdiction. Wherever complete justice can be attained in a

(a) 3 M. & S. 488.

(b) 13 East, 538.

(c) 2 Taunt. 49.

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court of law, a suit should be entertained if the thing claimed be a legal and not an equitable right.

The second objection is, that all the contracting parties amongst whom the penalties are to be divided, should have joined in the action.

We think that the members of a firm cannot, by agreement, give an authority to any one of them to bring an action in his name against persons not members of the firm; but where several parties create by agreement penalties to be paid by one of them to the others, we see no objection to their empowering one to sue for the others. Such an agreement is in effect an undertaking not to object on account of all who ought otherwise to have been joined in the action not being joined.

If there had been any thing in this objection, it might have been taken in *Davies v. Hawkins*, but it was not started either by the bench or bar. Corporations often make bye-laws, and by those laws direct that penalties shall be recovered against their members in actions brought by the head of the corporation for the use of the corporation. Such actions are properly brought in the name of the head of the corporation only. (a) The right to maintain actions by corporations, is founded on agreement between the members, as in the present case.

The third objection is, that there is no mutuality in the agreement, because if the Plaintiff incurred a penalty he could not sue himself. That would be a case not provided for by the agreement, and, therefore, all the other contracting parties who had incurred no penalty, must join in the action against him; they would thus obtain equal redress, although not in precisely the same manner.

(a) See 1 Bos. & Pul. 98., and the cases there cited.

Where an act of parliament directs that a company shall sue and be sued in the name of their clerk, and he has a claim against them for wages, he cannot sue himself, but must, notwithstanding the provision in the act, sue the company.

The next objection is, that the consideration of the Defendant's promise is not correctly set out in the declaration. It is insisted that it should have been stated, that he made his promise to fulfil the agreement in consideration of all the other contracting parties having promised him to fulfil the agreement on their parts, and not as it is stated in the declaration, in consideration of the plaintiff's having promised to fulfil his part of the agreement.

But the agreement is set out, and it is stated, that, in consideration of the premises, the Defendant undertook. This, we think, is sufficient, and that the other allegation is surplusage.

The last objection is, that it is not averred that the Plaintiff or the other contracting parties performed their parts of the agreement. It does appear on the declaration that the coach was brought to the Defendant's house, from whence he was to convey it on. This is the only thing that looks like a condition precedent to the performance of the Defendant's duty. Although this may not be set out with perfect precision, we think it cannot be objected to after verdict. The Plaintiff, therefore, may recover the 50*l*.

With respect to the 200*l*. for supporting another coach, there was no condition precedent to be performed by the plaintiff before he could recover that penalty; and, therefore, we think that after verdict no objection can prevail against the Plaintiff recovering that penalty on account of want of averment of the performance of any duty.

Rule discharged.

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April 27.

BLYTH v. BAMPTON.

Plaintiff purchased a horse for 55*l.*, the Defendant warranting him sound, and agreeing to give 1*l.* back if the horse did not bring Plaintiff 4*l.* or 5*l.*

The averment in the declaration was, that in consideration the Plaintiff would buy of the Defendant a horse for a certain price, to wit, 55*l.*, the Defendant undertook the horse was sound :

Held, a variance, *Gaselee J. dissentiente.*

THE declaration stated, that in consideration the Plaintiff would buy of the Defendant a horse for a certain price, to wit, 55*l.*, the Defendant undertook the horse was sound. Breach; want of soundness.

At the trial before *Best C. J.* last *Warwick* assizes, it was proved that Plaintiff was to have the horse for 55*l.*, but Defendant was to give a pound back if the horse did bring the Plaintiff 4 or 5 pounds.

The Chief Justice held this a fatal variance and directed a nonsuit.

Wilde Serj. moved for a rule *nisi* to set aside the nonsuit, and have a new trial. He contended that the substance of the declaration, was, that the Plaintiff had agreed to buy the Defendant's horse. That this was the true consideration on which the Defendant had been induced to warrant him sound. The price was immaterial, and laid under a *viz.*; and the Defendant's agreement to return 1*l.* on a contingency, might have been the subject of a cross action, but was no part of the consideration for the warranty of soundness. In *Gladstone v. Neale (a)*, a contract for the purchase of about eight tons of hemp was stated under a *viz.* in the declaration as a contract for eight tons; and this was held no variance. And in *Crispin v. Williamson (b)*, a contract for oranges, without any specification of price, was held to be well described, as a contract for oranges at a price laid under a *viz.* A rule having been granted,

(a) 13 *East*, 410.

(b) 8 *Taunt.* 107.

Bosanquet Serjt. shewed cause. This was a conditional contract, and is improperly described as having been absolute.

The consideration for the Defendant's warranty was the sum of 55*l.*, subject to a reduction of 1*l.* upon a contingency; and the declaration alleges, that it was absolutely the sum of 55*l.* The cases cited do not apply, because the contract in them was not conditional.

Wilde was heard in support of his rule.

BEST C. J. After regretting the state of the law with respect to variances, and pointing out the expediency of adhering to the decisions on the subject, in order that the inconvenience might be generally felt, and the law altered, held that this was clearly a conditional agreement; that it had been stated in the declaration as an unqualified agreement; and that, therefore, according to all the principles and decisions on the subject, the allegation could not be sustained. In the two cases referred to, a variation in respect of amount and price had been holden not material; but there was no case which went the length of deciding that a conditional contract could be declared on as absolute.

PARKE J. and BURROUGH J. expressed opinions to the same effect.

GASELEE J. differed: he thought the price immaterial, especially when laid under a *videlicet*; and further, that the price agreed on had been correctly stated in the declaration. But the price being settled at 55*l.*, the Defendant had entered into two engagements, one, that the horse was sound, the other, to return 1*l.* if the Plaintiff did not get 4*l.* or 5*l.* by him. It was sufficient in the first instance for the Plaintiff to sue upon the breach

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breach of one of these engagements, and he might afterwards have demanded the 1*l.* in case the horse were not, upon offering him to sale within a reasonable time, sold for 4*l.* more than 55*l.*

Rule discharged.

April 29.

GREGORY v. DOIDGE and Another.

The Plaintiff, who had occupied lands under *A.*, upon *A.*'s death entered into an agreement to pay rent to the Defendant, and paid 1*s.* as an acknowledgment of his title, being ignorant that it was disputed.

It turning out afterwards that the Defendant had no claim to the property, Held, that the Plaintiff might dispute the Defendant's title in a plea of non-tenuit in *replevin*.

REPLEVIN.

Avowry for rent arrear, with the usual allegation that the Plaintiff held the close in which, &c., as tenant thereof to the Defendant *Doidge* by virtue of a demise thereof to the Plaintiff theretofore made.

Plea, non tenuit, and issue thereon.

At the trial before *Gaselee J.*, last *Cornwall* assizes, it appeared that one *Beare* died seised of the close in which, &c., as heir *ex parte materná*, and that the Defendant *Doidge* who was heir *ex parte paterná*, had disputed with another claimant the possession of the property; but that after the death of *Beare*, *Doidge's* brother went to the Plaintiff, who had occupied as lessee of *Beare*, and induced him to pay 1*s.* as an acknowledgment of *Doidge's* title. The Plaintiff stated at the same time that his annual rent was 7*l.*, and it was agreed that the price of depasturing some cattle of the Defendant's should be deducted from the amount of the rent. This agreement was made by the Plaintiff in ignorance of the defect in *Doidge's* title. Notwithstanding some conflicting testimony about the agreement, a verdict was found for the Defendant, the learned Judge reserving to the Plaintiff the liberty of moving to enter a verdict for himself, if this Court should be of opinion he could,
 after

after the acknowledgment above stated, dispute the Defendant's title in a plea of non tenuit.

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Wilde Serjt., having obtained a rule *nisi* accordingly,

Peake Serjt., who shewed cause, argued that the Plaintiff having acknowledged the Defendant's title, and having agreed to the amount of rent he should pay, could not afterwards dispute the title: *Alchorne v. Gomme* (a): and though a distinction had been made where a tenant did not originally receive possession of the land from the avowants, *Rogers v. Pitcher* (b), yet the Plaintiff in the present case was concluded by having accepted a new demise from the Defendant. But

The Court was clearly of opinion that the Plaintiff having come into possession under a former owner, and having entered into this agreement in ignorance of the defect in the Defendant's title, might now shew that the Defendant was not his landlord. They considered the principle to have been clearly established by *Rogers v. Pitcher*, and the language of *Buller J.* in *Williams v. Bartholomew* (c), "If the tenant could have proved that his attornment proceeded on the misrepresentation of him who claimed as remainder-man, he might have proved that another was still alive and entitled;" and they mentioned as precisely in point the case of *Fenner v. Duplock* (d), in which it was holden that payment of rent by a lessee to a lessor, after the lessor's title had expired, and after the lessee had had notice of an adverse claim, did not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at

(a) 2 *Bingb.* 54.

(b) 6 *Taunt.* 202.

(c) 1 *B. & P.* 326.

(d) 2 *Bingb.* 10.

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the time of payment the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired.

Rule absolute.

April 18.

DE BERGARECHE v. PILLIN.

Where the acceptor of a bill of exchange accepts it payable at a banker's, it is not necessary in an action against the drawer to allege that the bill was presented to the acceptor in person, if there is an averment that it was duly presented at the bankers.

ASSUMPSIT against the drawer of a bill of exchange directed to *W. A. South*, who accepted it according to the usage and custom of merchants payable at *Sykes, Snaith, and Co.*

Averment, that when the bill became due, it was duly presented and shewn to and at the said *Sykes, Snaith, and Co.* for payment, according to the custom, and payment thereof was then and there required, according to the tenor and effect of the said bill and acceptance, but that the said *Sykes, Snaith, and Co.* did not pay the sum of money in the bill specified, or any part thereof, nor did *South*; of which premises the Defendant afterwards had notice.

Demurrer, assigning for cause, that the bill was accepted by *South*, payable at *Sykes, Snaith, and Co.*, and it is not expressed, nor does it appear in the declaration, that the words "not elsewhere" are contained in the acceptance, or any other words denoting that *South* would not pay the bill elsewhere than at *Sykes, Snaith, and Co.*, whereby, and by force of the statute in that case lately made and provided, the acceptance of the bill was general, and not special, and due presentment to *South* of such bill, when due and payable, ought to have been alleged, whereas no presentment of the bill to *South*

is

is alleged: and also, that no due presentment of the bill is alleged in the declaration.

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Spankie Serjt. in support of the demurrer. Whatever might be the case as against the acceptor, as against the drawer, presentation must be shewn according to the terms of the bill. Now, under the provisions of 1 G. 4. c. 77. this acceptance is a general acceptance, and under a general acceptance, presentation must be made to the acceptor; but presentation to *Sykes* and Co. is very different from presentation to the acceptor at the house of *Sykes* and Co. which ought to have been averred, or at least that the acceptor could not be found there.

BEST C. J. By the 1 & 2 G. 4. c. 77., it is enacted, "That if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill, payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place."

The result of the act is, that though a bill be by the acceptance made payable at a particular place, still the acceptance is to be esteemed a general obligation, and the acceptor may be called on elsewhere, as well as at the place indicated. But though the legislature has provided that the acceptor *may* be called on elsewhere, it has not made it *compulsory* on the holder to go elsewhere. It has been argued, indeed, that at all events,
the

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the acceptor should himself be called on at the place indicated, though the holder is excused by the act from presenting his bill to the persons who carry on business at that place;—or, that at least it should be averred that the acceptor was called on there and could not be found. But such an averment would be absurd; for the acceptor is never expected to be there, but his money. It is sufficient, therefore, to allege, as in the present declaration, that demand was made there for the money.

PARK J. The construction of the act, which has been contended for, is absurd; for if an acceptor must be always present at his bankers, where would be the convenience of making the bill payable at the bankers. The bill was, according to the averment, “duly presented for payment.”

BURROUGH J. Presentation to the acceptor in person has been dispensed with, by his pointing out the bankers, as the place at which payment of the bill might be obtained.

GASELEE J. concurred.

Judgment for the Plaintiff.

May 1.

SPROTT v. POWELL and Another.

Vestrymen
who signed a
resolution,
ordering the
parish sur-
veyor to take steps for defending an indictment for not repairing a road, were held

ACTION for the amount of an attorney's bill.

At the last *Maidstone* assizes, before the Lord Chief Baron, the case appeared to be as follows:

not to be responsible for the payment of the attorney employed by the surveyor.

At

At a special vestry for the parish of *Speldhurst*, holden in *April* 1821, the following resolutions were entered into:

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“ *Speldhurst* parish. At a special vestry, held in the said parish, the 27th *April* 1821, (pursuant to public notice,) for the purpose of taking into consideration the propriety of resisting an indictment instituted against the inhabitants of the said parish to compel them to repair a certain piece of road;

“ Resolved, that the above indictment be opposed.

“ 2d. That the surveyors be desired to take the necessary steps for carrying the first resolution into effect.” Signed by the two Defendants and six other parishioners.

The Plaintiff at this time was present as vestry clerk, and *Robert Fry*, the then surveyor, gave him instructions to defend the indictment.

The indictment was defended.

In *October* 1824, the Plaintiff delivered his bill to *James Richardson*, the then surveyor, but who had not been surveyor in 1821. The bill was headed, “ The surveyors of the parish of *Speldhurst* Drs. to *Walter Sprott*.” *Richardson* refusing to pay, the Plaintiff commenced the present action against the Defendants. They resisted payment on the ground that the surveyor for the current year was the person who ought by a rate on the parish to raise the necessary funds, and from time to time to satisfy claims such as that made by the Plaintiff. This was expressly provided for by the 13 G. 3. c. 78. s. 56. by which it is enacted, “ That if the inhabitants of any parish, township, or place shall agree at a vestry or public meeting to prosecute any person by indictment for not repairing any highways within such parish, township, or place which they apprehend such person is obliged by law to repair, or for committing any nuisance upon such highways, or shall agree at such vestry meeting

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meeting to defend any indictment or presentment preferred against any such parish, township, or place, it shall and may be lawful for the surveyor of such parish, township, or place, to charge in his account the reasonable expences incurred in carrying on or defending such prosecution or defence respectively, after the same shall have been agreed to by such inhabitants at a vestry or public meeting, or allowed by a justice of the peace within the limit where such highway shall be, which expences when so agreed to or allowed, shall be paid by such parish, township, or place, out of the fines, forfeitures, compositions, payments, and assessments authorized to be collected and raised by virtue of this act."

They also relied on *Lanchester v. Frewer* (a), and *Lanchester v. Tricker*. (b)

Under the direction of the learned Chief Baron, who referred to *Higgins v. Livingston* (c), a case heard on appeal from *Scotland* to the House of Lords, as a decision in favour of the demand, a verdict was taken for the Plaintiff, with liberty for the Defendants to move to enter a nonsuit.

Taddy Serjt. having obtained a rule *nisi* accordingly,

Bosanquet and *Wilde* Serjts. shewed cause. In employing the Plaintiff, the surveyor acted only as agent to the Defendants, and they were equally liable as if they had named him and employed him themselves. The act of parliament did not take away the Plaintiff's common law remedy against those by whom he had been employed. But the act itself gave him no remedy in a case like the present;

The 47th section requires that the accounts of the surveyor should be annually made up and presented

(a) 2 *Bingb.* 361. (b) 1 *Bingb.* 201. (c) Not yet reported.

fifteen days before the special sessions held in the week after the *Michaelmas* sessions. The Plaintiff's bill, from the duration of law proceedings, could not be made out till two or three years after he was first employed, and how could he charge successive sets of surveyors with fractional portions of an incompleated expence? The statute called on the magistrates to allow the surveyor's bill, but how could they judge of it, or allow it, without seeing the whole at once? and if they refused to allow it, as the Court of King's Bench would not grant a mandamus against the magistrates in such a case, what remedy had the Plaintiff against the surveyor? The only question, therefore, was, whether or not he had been employed by the vestry, for if employed by them, every person attending was individually responsible. In *Horseley v. Bell* (a), which was a bill filed against the commissioners of a certain navigation in *Yorkshire*, *Ashurst* J. said, "I think the Defendants are personally liable; it would be hard that the Plaintiff, who has done the work at a reasonable price, should have no remedy." And in *Eaton v. Bell* (b), it was holden that commissioners of an inclosure were privately responsible to their bankers for drafts drawn in respect of the inclosure, though the drafts required the bankers to place the sums mentioned in them to the drawers' account as commissioners.

In like manner in *Higgins v. Livingston* the commissioners of a turnpike between *Edinburgh* and *Glasgow*, were held responsible, in their private capacity, to persons employed by them about the construction and repair of the road. And in *Brook v. Guest* (c) *Abbott C. J.* held a churchwarden individually responsible to a person whom he had employed to draw plans of a church

(a) 1 Br. Cb. Cas. 101.

(b) 5 B. & A. 34.

(c) N. P. Stafford Summer assizes, 1825.

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for the inspection of the commissioners for building new churches under 58 G. 3. c. 41.

These decisions were not adverted to in the arguments in *Lanchester v. Frewer*, and *Lanchester v. Tricker*, and those cases are distinguishable from the present on the ground that *Lanchester* was a churchwarden, and instead of commencing an action, might have raised a rate to indemnify himself.

Taddy contra. So the surveyor in the present case was authorized under 13 G. 3. to raise a rate out of which he might have reimbursed himself, upon presenting annually to a vestry or a magistrate the account of the expences incurred within the year; and the Plaintiff was not employed by the vestry, but by the surveyor. Even if he had been employed by the vestry, vestrymen are not individually responsible for orders given by the vestry as a collective body; the reasons for this are fully given in *Lanchester v. Frewer*. For the performance of such orders a rate is raised on the inhabitants of the parish generally, and no one would attend to the parish business at the risk of being individually responsible. The cases referred to on the other side are all cases of commissioners or churchwardens who had power to raise a fund for reimbursing themselves, and who suffered from their own neglect.

BEST C. J. The Court has no intention of impeaching the decisions which have been referred to by the counsel for the Plaintiff, but which have nothing to do with the present case. In the cases referred to the parties voluntarily placed themselves in the responsible situation of commissioners, a situation which bears no resemblance to that of the inhabitants of a parish resorting to a vestry. Commissioners have, in almost every instance,
power

power to raise tolls, or to impose assessments to indemnify themselves, and they ought, therefore, to avoid entering into an undertaking until they have money in hand, or have ascertained that the tolls will cover the expence. In *Higgins v. Livingston* the parties sought to be charged were commissioners of a turnpike between *Edinburgh* and *Glasgow*, and they had the usual powers of making contracts, raising tolls, and borrowing money. In *Brook v. Guest*, and *Lanchester v. Frewer*, the party charged was a churchwarden, and might have reimbursed himself by a rate for the expence he had incurred on behalf of the parish. *Eaton v. Bell* was decided on the same principle, and it was holden that commissioners under an inclosure act which empowered them to make a rate to defray the expences of the enclosure, were liable to their bankers for the amount of drafts drawn in respect of the enclosure. *Bayley J.* says, "The Defendants must have known what they had collected, and what means they had of collecting more, and they ought to have taken care, before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts." He puts it expressly on the ground that the Defendants had the means of raising rates to reimburse themselves; and the same observation is applicable to the case of *Horsly v. Bell*. The Defendants in the present case have not voluntarily engaged in any commission, nor have they any means of raising tolls to indemnify themselves.

They have merely met in a vestry, and agreed to certain resolutions; they have not, as it has been asserted, employed the Plaintiff as an attorney, for the resolutions agreed to, order the surveyor to take measures for defending the indictment, and according to the 19 G. 3. c. 78. s. 56. whatever is done in this respect must be done under the surveyor's authority; he is to carry on the proceedings, to incur the expence in the first instance, to charge it to

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the parish account after it has been agreed to at a public meeting, or sanctioned by the order of a magistrate, and to be paid out of the fines, payments, and assessments raised by virtue of the act.

The persons who meet in vestry are only to put the surveyor in motion, and control his charges; but they enter into no personal undertaking to pay the parties employed by him. This case was depending three years. The inhabitant of a parish would be in a cruel situation if he were to leave the parish shortly after attending a vestry, and be liable for years to the charges of a surveyor over whom he has ceased to have any control.

The vestry clerk should have presented his bill yearly that the parish might determine from time to time whether they would sustain the expence of further proceedings, and also that every inhabitant might be assessed in his due proportion; otherwise, as I said in the case of *Lanchester v. Brewer*, a man who had but five pounds a year in the parish might be subjected to the same burthens as men who had a thousand. Therefore, the law wisely considers the resolutions of a vestry, not as the personal undertaking of each vestry man, but as merely intended to put the surveyor in motion, who is afterwards to be reimbursed by a regular rate upon the whole parish.

PARK J. If the law were as the Plaintiff's counsel have contended, no respectable inhabitant would attend a vestry meeting, and the business of a parish would fall into inferior hands, who would render the whole a job. It seems to me that the 58 G. 3. c. 65. has decided this case, and I see no difficulty in it. The resolutions of this vestry were such as the act requires.

The surveyor is the proper person for conducting the business, and he is to charge the parish in his account.

The

The Plaintiff had only to deliver his bill to the surveyor *de anno in annum*; the surveyor should have applied to the vestry, and if the vestry refused to make an assessment for his charges, he might resort to a justice of peace.

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The cases cited are distinguishable on the ground that the parties in those cases were chiefly commissioners, who had entered upon their functions voluntarily, and were able to raise a fund for their own indemnity.

In *Brook v. Guest*, a churchwarden was holden liable for the expence of a plan of a church which he had procured for the approbation of certain commissioners for building new churches. But the churchwarden was the proper person to procure such a plan, and he might have reimbursed himself out of the church rates. That was the ground of decision in *Lanchester v. Frewer*, and much of the reasoning in that case applies to the present. I am of opinion, therefore, that parties meeting in vestry are not personally responsible, and that the rule which has been obtained must be made absolute.

BURROUGH J. If the learned Chief Baron had known the course of business in parishes, he would have had no difficulty in this case. The act of 58 G. 3. shews how money is to be raised for parish purposes, and how applied, and the Plaintiff who, as vestry clerk, must have known the course of business, might have delivered his bill by parts every year to the surveyor in office, and he would have included it in the charges of the current year, by which means the burthens would have been thrown on those who inhabited the parish at the time, and who ought to sustain it. The cases, therefore, which have been cited do not apply, because the surveyor has the credit and land of all the parish, upon which he may levy assessments distributed in just proportions; and for this reason the surveyor himself could not have sued

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the Defendants, if he had paid the Plaintiff; he ought to proceed according to the directions of the act, which are clear, and beneficial to the interests of all.

GASELEE J. The present decision will not impeach the authority of any of those which have been referred to. The Defendant, and others assembled in vestry, directed the proper officer to take proper steps for resisting an indictment for the repair of a road; they left it to the surveyor to employ an attorney: that, among other circumstances, tends to shew that they meant to incur no personal responsibility, and there is not a pretence for saying that they undertook individually to pay the Plaintiff.

Rule absolute.

May 2.

TWISS, Assignee of WRAGG, an Insolvent, v.
WHITE.

A. agreed to sell to *C.* a copyhold, the legal title to which had, by mistake, been conveyed to *B.*

A. subsequently was discharged under the insolvent debtor's act.

After his discharge, *B.* surrendered the copyhold to *A.*, who surrendered it to *C.*, and *C.* paid the purchase money to *D.* on *A.*'s behalf:

Held, that *A.*'s assignee, under the insolvent debtors' act, might recover this money from *D.*

Held, also, that *D.* might retain out of it his charges for conducting the sale of the copyhold, and the amount of a bond, which, at the time of the agreement to sell the copyhold, *A.* had given to *D.*, with a promise to pay it out of the proceeds of the sale.

On

On the 15th of *June* 1822, one *Clear* agreed in writing with *Wragg* to purchase of him certain copyhold property. On the 28th of *July* 1822, *Wragg* went to prison, and was, after the usual assignment of his property, discharged under the insolvent debtors' act, the 12th *December* 1822.

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In the interval it was discovered, that the copyhold which *Wragg* had agreed to sell to *Clear*, had by mistake been included in a conveyance of some other property to Lord *Hardwicke's* trustees in the year 1807.

On the 30th of *December* 1822, these trustees, by a letter of attorney to the Defendant who had conducted the business between *Wragg* and *Clear*, surrendered the copyhold to *Wragg*, who, on the same day, surrendered it to *Clear*, in consideration of 220*l.* which was paid to the Defendant for *Wragg* on the next day.

The Defendant's bill, principally for effecting the transfer of this property, was 11*l.* 18*s.* 10*d.*, and *Wragg* owed him 40*l.* on bond, both which debts he had, before he went to prison, agreed the Defendant should deduct out of the proceeds of this copyhold, when received.

The Defendant insisted he had a lien on the proceeds, or a set-off against the assignee, to the amount of these two sums, and offered to pay the Plaintiff the balance, 68*l.* 1*s.* 2*d.*

It was also objected on the part of the Defendant, that the proceeds of this copyhold estate having accrued to the insolvent *Wragg* after his discharge, the Plaintiff could not recover them by action, but only by application to the insolvent debtor's court to issue execution on the judgment entered up against the insolvent pursuant to 1 *G. 4. c. 119. s. 30. Hepper v. Marshal (a)* was relied on.

(a) 2 *Bingb.* 372.

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v.
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A verdict was thereupon taken for 68*l.* 1*s.* 2*d.*, the balance admitted to be due, with liberty for the Defendant to move to enter a nonsuit on the above ground, and for the Plaintiff to move to increase the damages by the amount of the Defendant's bill and bond; the amount of the bill, supposing him to be entitled to set it off, being referred to an arbitrator. Rules *nisi* to this effect having been obtained,

Wilde Serjt. now shewed cause against the rule for entering a nonsuit, and supported the rule for increasing the damages. He argued, that though the money due on the sale of the estate to *Clear* was not paid till after *Wragg's* discharge, the title to the estate was vested in *Wragg* at the time of the transfer of his property to the Plaintiff, as his assignee under the insolvent debtor's act. Lord *Hardwicke's* trustees being in possession of the legal title by mistake, were, as to that estate, trustees for *Wragg*, and after the assignment trustees for the Plaintiff. The trust property having so passed to him, he was entitled to follow the proceeds, *Taylor v. Plumer.* (a)

But the Defendant had no lien on the proceeds for the amount of his bond, because those proceeds never belonged to *Wragg*, and the engagement by him to pay the amount of the bond out of those proceeds was therefore a nullity.

Taddy Serjt., *contra*. *Wragg*, at the time of assignment of his property to the Plaintiff, had not a perfect equitable interest in the estate sold to *Clear*, but a mere claim to relief in equity against Lord *Hardwicke's* trustees on the ground of a mistake; and this claim for relief could not be the subject of an assignment under the insolvent debtor's act.

(a) 3 *M. & S.* 562.

But

But if he had a perfect equitable title, he had the power of charging that title with the payment of the bond and expences, and the Plaintiff must take it, if at all, subject to the charges so attached to it.

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BEST C. J. I am of opinion the Plaintiff is entitled to the sum he has recovered : he is entitled to recover, in respect of the proceeds of the estate which was conveyed by Lord *Hardwicke's* trustees to *Wragg*, after his discharge from prison, and the case of *Hepper v. Marshal* does not apply to the present. That case decided that the assignees of an insolvent cannot recover by action, property which accrues to an insolvent after his discharge, but must, under the statute, apply to the insolvent debtor's court to issue execution on the judgment entered up in their names against the insolvent. But the property in dispute in the present case was vested in the insolvent at the time of the assignment of his effects to the Plaintiff. The statute (1 G. 4. c. 119.) transfers to the insolvent's assignee all his equitable as well as legal estate, and he had an equitable interest in the property, the legal title to which had, by mistake, been conveyed to Lord *Hardwicke's* trustees. This property they might at any time have been compelled to reconvey ; when they reconveyed, the Plaintiff, by demanding the proceeds in the hands of the Defendant, ratified the bargain which the insolvent had made with *Clear*, and according to the principles established in the case of *Taylor v. Sir Thomas Plumer*, the Plaintiff was entitled to follow the proceeds in the hands of the Defendant.

But if the insolvent had an equitable interest in the property sold to *Clear*, he had a right to charge it with an equitable lien, and where a set-off has been pleaded in an action of assumpsit, the assignee must take the proceeds subject to that charge. It has been urged, indeed,

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deed, that he could not create a lien or attach a charge on the proceeds because they never belonged to him; but the charge attached on the estate before it was sold, and on the proceeds. It seems to me that what passed between the insolvent and the Defendant before the insolvent went to prison, amounted to an equitable pledge of the proceeds of the estate, whenever they should come into the Defendant's hands, for the amount of the Defendant's general bill, and for the said sum on bond. Possession of those proceeds could not then be obtained; the case is therefore not affected by those in which it has been held, that a pledge of personal property, the possession of the property not being delivered to the pawnee, is void. If that agreement amounted to a good equitable mortgage, it may be set up against an action for money had and received, which is an equitable action, and in which the Plaintiff can recover no more than he is equitably entitled to. It is admitted that Defendant is entitled to a lien for his bill for business done relative to the sale; and I am of opinion, that he is also entitled to retain to the amount of the remainder of his bill and the forty pounds. The rule for a nonsuit, therefore, must be discharged, and the rule for increasing the damages must be suspended till it shall have been ascertained how much the arbitrator allows for the Defendant's bill.

PARK J. This case is very different from that of *Hepper v. Marshal*, in which the property in dispute did not come to the insolvent till after his discharge. The insolvent in the present case, was at the time of the assignment to the Plaintiff, under the insolvent debtor's act, equitable owner of the property, the proceeds of which the Plaintiff now seeks to recover. Then, at a time when the insolvent was *sui juris* with respect to this equitable property, he borrows on the credit of it
money

money of the Defendant, which he engages to pay out of the proceeds of the sale; he had a right to charge the property in this way, and the Defendant is, therefore, entitled to retain the 40%. This he will retain, with so much of his bill as an arbitrator shall find to be due.

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BURROUGH J. The assignee takes the estate, subject to the bargain which had been made by the insolvent; the Defendant, therefore, is clearly entitled to the 40% under the bond.

GASKLEE J. The estate of which the Defendant received the proceeds, was property belonging to the insolvent at the time of the insolvency, and consequently passed under the assignment. The money, therefore, which the Defendant received in lieu of that property was received to the use of the assignee, subject to such charges as the insolvent was entitled to attach on the property, and the assignee must take it subject to those charges. The rule for a nonsuit, therefore, must be discharged, and the rule for increasing damages be suspended till an arbitrator shall have ascertained what the Defendant is entitled to beyond the 40% which he claims on the insolvent's bond.

Rules discharged and suspended accordingly.

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May 5.

HOLROYD v. DONCASTER.

A party who sues another for arresting him on an illegal warrant is not bound to produce the warrant.

THIS was an action of trespass for false imprisonment, tried before *Bailey J.* last *York assizes*. The declaration was in the usual form. A constable who had made the arrest of which the Plaintiff complained, stated that he had arrested Plaintiff under a warrant which he received from another person, and that when about to execute it, the Defendant desired him to make haste. It was also proved, that the Defendant had admitted in conversation, that he had sent the Plaintiff to prison. But no warrant was produced in evidence. The Plaintiff's counsel, however, having opened the case as an arrest upon an illegal warrant, it was objected on the part of the Defendant, that the Plaintiff ought to produce the warrant.

A verdict was taken for the Plaintiff, with liberty for the Defendant to move to enter a nonsuit, if the Court should be of opinion that the Plaintiff ought to have produced the warrant.

Wilde Serjt. accordingly moved for a rule to this effect, on the ground that the Plaintiff ought to have produced the warrant which was the cause of his action; also, that it sufficiently appeared from the Defendant's admission, that the Plaintiff had been apprehended under a warrant, and that, therefore, the action ought to have been conceived in case and not in trespass. *Morgan v. Hughes (a), Stonehouse v. Elliott. (b)*

(a) 2 T. R. 225.

(b) 6 T. R. 315.

A rule

A rule *nisi* was granted, and *Wilde* was this day heard in support of it. But

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The Court were clearly of opinion, that the warrant not having been produced, there was no legitimate evidence on which it could be presumed that it had ever issued, or that the action ought, in consequence, to have been case; and that, with respect to the production of the warrant, it was equally clear that a party who took upon himself to imprison another was *prima facie* guilty of a trespass, the onus of justifying which rested entirely with himself.

Rule discharged.

TATTLE v. GRIMWOOD.

May 5.

THE defence to this action was a commission of bankruptcy sued out against the Defendant in *January* 1825, and a certificate obtained under it in *November* 1825.

The 5 G. 4. c. 98., which repealed the former bankrupt acts, enacted, that after *June* 1824, a bankrupt's certificate should not be received in evidence unless entered of record.

The certificate not having been enrolled, it was objected at the trial after last term before *Best* C. J., that according to the provision of 5 G. 4. c. 98. the Defendant could not avail himself of it.

The 6 G. 4. c. 16. repealed

A verdict having been taken for the Defendant,

Taddy Serjt. obtained a rule *nisi* to set it aside, against which, *Wilde* Serjt. now shewed cause.

the 5 G. 4. c. 98. from *May* 2d, 1825, and the old statutes from *September* 1st, 1825; it provided also, that its enactments respecting certificates should take effect from *May* 2d, 1825, and that certificates on commissions issued after the act took effect, should be entered of record. "The present practice in bankruptcy" was, by s. 135, to be continued, unless when alterations were expressly declared.

Where a commission was issued in *January* 1825, and the certificate obtained in *November* 1825:

Held, that it need not be entered of record.

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The 5 G. 4. c. 98., which repeals all former acts relating to bankrupts, was passed in *June* 1824, but was not to come into operation, except as to certificates (section 133.), till *May* 1st, 1825. According to section 92. of that act, certificates are not to be read in evidence unless enrolled. This section came into force on the passing of the act in *June* 1824.

By section 136. of 6 G. 4. c. 16., which passed *May* 2d, 1825, the 5 G. 4. c. 98. was repealed from that day; the other provisions, however, of the 6 G. 4. c. 16., which also repeals the former acts, were not to be in force till *September* 1st, 1825, excepting its enactments respecting certificates, which enactments were also to take effect from the 2d *May* 1825 (section 136.) But the 96th section of this 6 G. 4. c. 16., which also requires that certificates shall be enrolled, applies only to certificates on "commissions issued *after* that act shall have taken effect:" and section 135. enacts, that nothing in that act contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared.

The Defendant, therefore, not having obtained his certificate till *November* 1825, could not have it enrolled under the 5 G. 4., for that was repealed *May* 2d, 1825. Nor could he have it enrolled under the 6 G. 4. c. 16., because the commission on which it was founded, issued before the 6 G. 4. c. 16. was even passed; those were circumstances for which no alteration in the practice in bankruptcy had been expressly declared by 6 G. 4. c. 16., consequently by section 135. of that statute, he was authorised to pursue the then present practice, that is, the practice existing upon the passing of that act, and the repeal of 5 G. 4. c. 98. That was the practice under the old statutes.

Taddy, contra, contended, that by the operation of 6 G. 4. c. 16., the old statutes relating to bankruptcy were

were only in force on the repeal of 5 G. 4. c. 98., from *May 2d to September 1st 1825*; the practice, therefore, under those statutes, could not apply in a case where the commission issued in *January 1825*, and the certificate was signed in *November 1825*.

By express provision the 6 G. 4. c. 16. was precluded from applying to a certificate on a commission issued before that act passed. But the Defendant's case being one of a certificate, for which no alteration had been expressly declared by the 6 G. 4. c. 16. must, according to section 135. of that act, be regulated according to the then present practice in bankruptcy, and the then present practice, the practice at the time of the passing of the act (*May 2d, 1825*), was the practice under 5 G. 4. c. 98., which required enrolment.

Cur. adv. vult.

BEST C. J. now proceeded to deliver the judgment of the Court.

This was an action on a bill of exchange, dated the 5th of *October 1824*, which had been indorsed by the Defendant to the Plaintiff. To this action the Defendant pleaded the general issue; and, secondly, a commission of bankrupt of the date of the 29th of *January 1825*, and that the causes of action accrued before he became bankrupt. In support of this plea, a certificate duly allowed, dated the 5th *November 1825*, was offered in evidence. It was objected by the counsel for the Plaintiff that this certificate could not be received, because it had not been *entered of record*.

When this objection was first presented to me at *Nisi Prius* I felt some apprehension that the Defendant might be deprived of the protection which the bankrupt laws were made to give to honest but unfortunate debtors, and some alarm lest commissions of bankrupt issued after the repeal of the 5 G. 4. c. 98. and the

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the day when the 6 G. 4. c.16. was to take effect, might be found to be invalid. I was completely satisfied, however, before the cause was over, that there was nothing in the objection that had been made, and received the certificate in evidence, without reserving any point on it for the consideration of the Court. A motion has been made for a new trial, on the ground that the certificate not having been enrolled, was not admissible in evidence. My brothers *Burrough* and *Gaselee* both agree with me that there is no pretence for the motion. My brother *Park* was unfortunately prevented by indisposition from hearing the argument.

It is an undoubted rule of law that if an act of parliament, which repeals former statutes, be repealed by an act which contains nothing in it that manifests the intention of the legislature that the former laws shall continue repealed, the former laws will, by implication, be revived by the repeal of the repealing statute. This rule is established by the resolutions of the judges in the House of Lords in the case concerning bishops (a), which I mentioned at the trial. By the first section of the 5 G. 4. c. 98. all the bankrupt acts from 34 H. 8. to 3 G. 4., inclusive, are repealed. By the last section of this statute none of the enactments (except such as relate to certificates of persons becoming bankrupts before the 1st of *May* 1825,) take effect before the 1st of *May* 1825. The former bankrupt laws, therefore, are not repealed before the 1st. of *May* 1825, by 5 G. 4.

The statute of the 6 G. 4. c.16. passed on the 2d of *May* 1825. On that day by the operation of the 5 G. 4. all the old bankrupt laws were repealed, and 5 G. 4. was the only act in force. The 5 G. 4. was by the 136th section of 6 G. 4. repealed on the 2d of *May*,

(a) 12 Rep. 7.

having

having been in force one day only, namely, from the 1st of *May* to the 2d of *May*. This put an end to the necessity of registering certificates under that act. But the repeal of the 5 G. 4. according to the rule established by the case in 12 *Coke* revived all the old statutes, for although all these statutes are again repealed by the first section of 6 G. 4. which would prevent their revival by implication by the repeal of the repealing statute, the 136th section prevents the 1st section from repealing them until the day when the 6 G. 4. is generally to take effect, namely, the 1st of *September 1825*. From the 2d of *May* until the 1st of *September*, the old statutes were revived, and by the repeal on the 2d of *May* of the 5 G. 4. were in force. On the 1st of *September 1825* the 6 G. 4. came into full operation, and the 5 G. 4. was completely got rid of.

The certificate in this case is of the date of the 5th *November 1825*; the commission issued on the 29th *January*. Now the 96th section of 6 G. 4., which prevents certificates not registered from being received in evidence, applies only to commissions issued *after the passing of that act*. This commission issued *before the passing of that act*; and the certificate under it is not affected by the clause relative to certificates.

The 92d section of 5 G. 4. enacts, that no certificates that are not registered under commissions issued after the passing of that act, shall be received in evidence. But although this commission issued after the passing of that act, it issued before the act took effect, and in virtue of the old statutes, which at the time of the issuing this commission were in full force. Besides, before this certificate was allowed or signed, the 5 G. 4. was completely repealed, and therefore the 92d section of that act cannot affect this case. But it has been said that statutes, in all other respects repealed, are sometimes kept in force as to by-gone transactions: but there is no

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clause of this sort in the 6 G. 4. ; and therefore the 5 G. 4. has no more effect in this case than if it had never existed. It has been also said that the words, "*all enactments herein contained relating to certificates of conformity shall take effect after the passing of this act,*" brings into immediate operation so much of the 96th section as prevents certificates from being received in evidence which are not duly registered immediately after the 2d of *May* 1825. This cannot be the true construction, for the 96th section is in terms confined to commissions issued *after the first day of September, the day on which the act took effect*: such a construction would not only make the different sections of the act inconsistent with each other, but would produce this absurd consequence, — that certificates of conformity in commissions issued before the first of *September* must be registered, although the act does not require the registration of such commissions, or of any other proceedings under such commissions.

The words quoted from the 136th section, refer to the 121st and 122d sections, which give to bankrupts the benefits of certificates, and direct how they shall be signed and allowed, and not to that which prevents certificates from being given in evidence.

The manner in which the first of these acts dealt with the previous statutes, and the last of them has dealt with the first and with all previous laws relating to bankrupts, has occasioned no small puzzle, but the decision we have come to renders the different parts of these acts consistent.

The rule for a new trial must be discharged.

Rule discharged accordingly.

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DENMAN, Demandant; BULL, Tenant.

May 6.

THE Demandant took the record down for trial at the last Summer assizes; but having entered it at the bottom of the list, it became a remanet to the last Lent assizes. At those assizes the tenant appeared, but the Demandant did not proceed to trial.

Demandant took the record down to the assizes. The cause was made a remanet. At the next assizes the tenant appeared, but the demandant did not try.

Taddy Serjt. obtained a rule *nisi* to enter judgment as in case of a nonsuit, against which *Laves Serjt.* shewed cause. He cited *Mewburn v. Langly (a)*, to show that such a rule could not be made absolute after the Demandant had once taken the record down to trial; he also contended, that judgment as in case of a nonsuit could only be entered in those cases where the statute enabled a Defendant to take down the cause by proviso, and that that statute did not apply to writs of right.

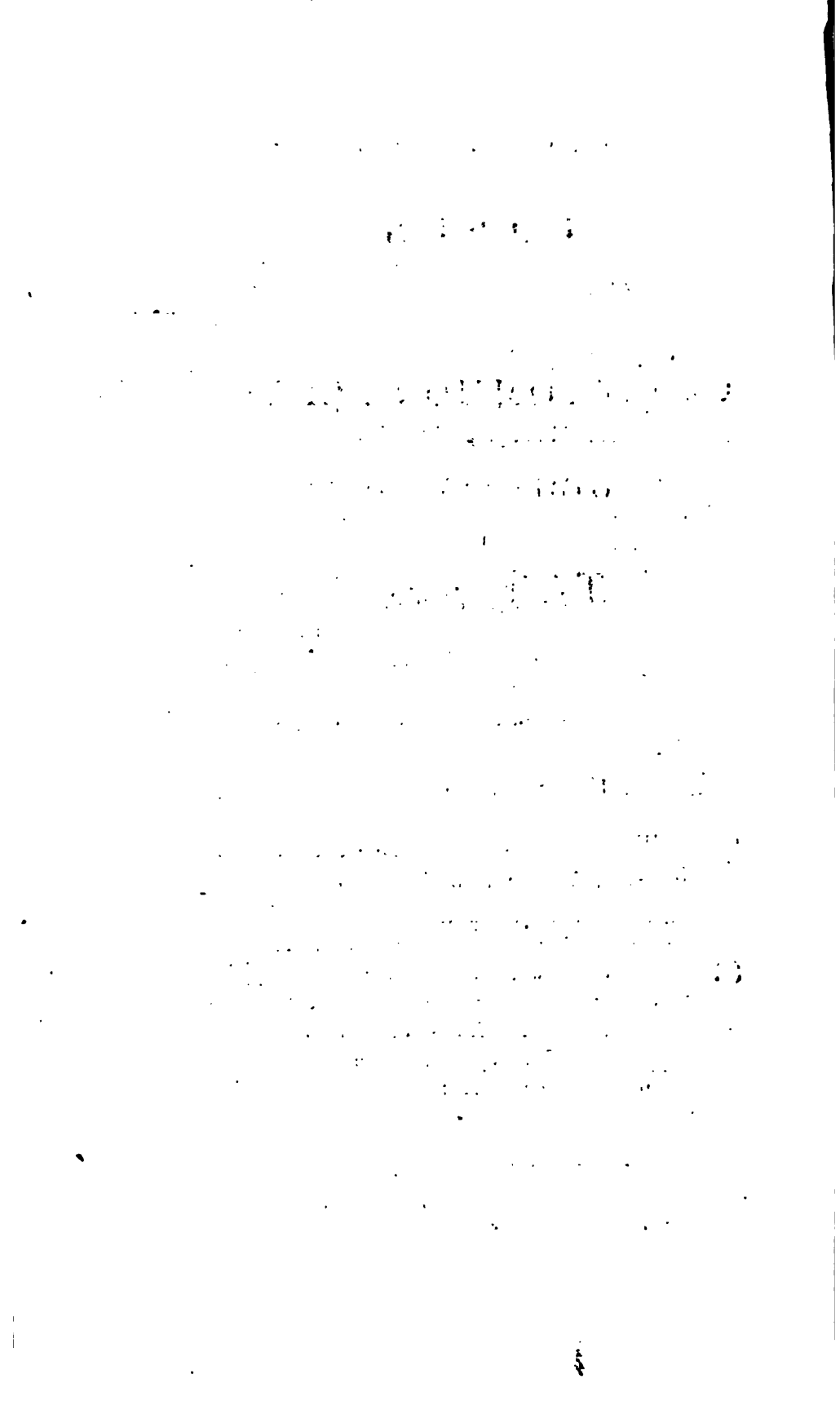
The Court refused to allow the tenant to enter judgment as in case of a nonsuit.

Per Curiam. It was decided in *Mewburn v. Langly*, that if a Plaintiff takes his cause down for trial, and it be made a remanet, although he withdraws his record at the assizes at which it remained to be tried, the Defendant cannot have judgment as in case of a nonsuit, but must carry his record down by proviso. It is not necessary to decide whether the statute of G. 2. applies to writs of right. If writs of right are within the statute,—according to the case referred to, the tenant is prevented from opposing this rule by the cause having been carried down and made a remanet.

Rule discharged.

(a) 3 T. R. 1.

END OF EASTER TERM.



CASES

ARGUED AND DETERMINED

1826.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the Seventh Year of the Reign of GEORGE IV.

HOUSE OF LORDS.

BRICE WILLIAM FLETCHER, Clerk, *v.* LEWIS
RICHARD Lord SONDES Baron SONDES.

(In Error.)

ON the 1st and 2d of *May* 1826, the Judges (with the exception of *Bayley J.*, *Holroyd J.*, and *Littledale J.*) delivered, in the House of Lords, their opinions upon this case. The case and arguments upon it are so fully stated in those opinions, that it would be improper to repeat them here.

GASELEE J. This is an action brought by the Defendant in error, in the Court of King's Bench, against

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the Plaintiff in error, on the bond of the latter, in the penal sum of 12,000*l*.

The declaration was on the bond in the common Form, not setting out the conditions.

The Plaintiff in error suffered judgment by default whereupon, in consequence of the statute of the 2 & 9 *W. 3* c. 11, it became necessary for the Defendant, in error, to make a suggestion setting out the conditions of the bond; alleging a breach of the conditions, praying writ of enquiry to ascertain the truth of such suggestion and to assess the damages sustained by the Defendant in error by reason of the breach so suggested.

The record accordingly stated the condition of the bond in the words following:—

Whereas the above-named *Lewis Richard Lord Sondes* is the true and undoubted patron of the rectory of *Kattering*, in the county of *Northampton*, which rectory is now become vacant by the death of the Rev. *Joseph Knight*, clerk, the late incumbent thereof. And whereas the said *Lewis Richard Lord Sondes*, by writing under his hand and seal, bearing equal date with the above-written obligation, has presented the above bounden *Brice William Fletcher* to supply the said vacancy, and to be rector of the said rectory, in order that the said *Brice William Fletcher* may be instituted and inducted thereto by the proper ordinary. And whereas the said *Brice William Fletcher* has agreed to resign the said rectory into the hands of the proper ordinary upon such request or notice as hereinafter mentioned, so as that the said rectory may thereby again become vacant to the intent and for the sole and only purpose that the said *Lewis Richard Lord Sondes*, his heirs or assigns, or other the person or persons who shall for the time being be the owner or owners of the advowson of the said rectory, may be enabled to present therein anew either the Honourable *Henry Watson*, or

of the younger brothers of the said *Lewis Richard Lord Sondes*, or the Honourable *Richard Watson*, the youngest brother of the said *Lewis Richard Lord Sondes*, when such of them as is to be so presented shall be capable of taking an ecclesiastical benefice: then, my Lords, the penalty sought to be recovered is founded upon the breach of the following condition: "That if the above bounden *Brice William Fletcher* shall and do upon the request of the said *Lewis Richard Lord Sondes*, his heirs or assigns, or other the person or persons who for the time being shall be the owner or owners of the said advowson, or upon notice in writing to be left for him the said *Brice William Fletcher* by the said *Lewis Richard Lord Sondes*, his heirs or assigns, or other the person or persons who for the time being shall be the owner or owners of the said advowson, at the rectory or parsonage house of the said rectory, and within one month after such request made or notice left, absolutely and effectually resign and deliver up the said rectory and parish church of *Kettering*, with the appurtenances, into the hands of the proper ordinary or guardian of the spiritualities for the time being, whereby or so as that the said rectory and parish church of *Kettering* shall become and be absolutely vacant; and the said *Lewis Richard Lord Sondes*, his heirs or assigns, or the person or persons who for the time being shall be the owner or owners of the said advowson, be thereby enabled to and may present anew to the said rectory and parish church of *Kettering* either the said *Henry Watson* or *Richard Watson*, when such of them as is to be so presented shall be capable of taking an ecclesiastical benefice; and also if the said *Brice William Fletcher* do not or shall not commit or suffer, or cause to be committed or suffered any waste or dilapidations upon all or any of the houses, lands, tenements, or hereditaments belonging to the said rectory or parish church of

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Kattering during the time he the said *Brice William Fletcher* shall be and continue the rector or incumbent of the same rectory, then the above-written obligation to be void, otherwise to be and remain in full force and virtue." It then assigns as a breach, that *Henry Watson*, one of the younger brothers of the Defendant in error, on the 11th *October* 1820, became capable of taking an ecclesiastical benefice; that the Defendant in error was desirous that the Plaintiff in error should resign the living, that he might present the said *Henry Watson*, and requested him so to do; but that he had refused, and still refuses, to make such resignation, to the damage of the Defendant in error of 12,000*l.*

Upon this suggestion, a writ of enquiry was executed before the Chief Justice, and a special jury assessed the damages at 10,000*l.*, for which judgment has been entered up.

Upon this judgment the Plaintiff in error brought a writ of error in the Exchequer Chamber, where judgment was affirmed without argument, and has since brought a writ of error before your Lordships, and your Lordships having heard the case argued, have directed the following question to be submitted to the opinion of the Judges :

Whether sufficient matter appears upon the record to show, that either by statute or common law the bond upon which the action of the Defendant in error was brought in this case, and stated upon the record to bear equal date with the writing of presentation therein mentioned, is void or illegal ?

My Lords, the Judges have taken this question into their consideration, and differing in opinion upon it, it is my duty, according to the practice of your Lordships' House, to state my opinion upon the question, and such reasons as have occurred to me in support of such opinion.

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It is, my Lords, with the utmost diffidence that I venture to give an opinion which is at variance with that of many of my learned brothers; but, my Lords, after the best consideration I have been enabled to give to the subject, and to the several authorities to be found in the books, I feel myself bound to answer to the question put by your Lordships in the negative.

My Lords, the ground of objection which has been taken to this bond is, that it is simoniacal, and not only contrary to the stat. 31 *Eliz. c. 6.*, but also to the common law and public policy.

But another question has been raised at the bar, whether, admitting this objection to be good, it can be taken advantage of in the present state of the record, or whether there should not have been a plea averring that the bond was given in consideration of the presentation.

I apprehend it will not be necessary to consume much of your Lordships' time in the consideration of this question, because it appears to me to be impossible to read the conditions of the bond without coming to the conclusion that the bond was given in consideration of the presentation, and if so, it is unnecessary to introduce any specific averment of that fact.

I shall therefore confine the observations I have to trouble your Lordships with, to the principal question whether special resignation bonds for the purpose of presenting particular persons when capable of taking the benefice, are illegal; and whether persons mentioned in these conditions are such in whose behalf such a stipulation may be made?

Of course I confine myself to special resignation bonds, because since the case of *Ffytche* and *The Bishop of London*, which was decided in this House in the year 1783, I am precluded from contending that a general resignation bond can, under any circumstances, be supported.

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The circumstances of that case have been so fully stated to your Lordships in the argument, and I apprehend are so well known to every one of your Lordships, that I shall not waste your time by stating them.

Before the determination of that case by this House, there had been many cases in which it had been decided by the Courts below that general resignation bonds were, upon the face of them, good, and were not to be avoided; except by plea showing them to have been originally made upon some corrupt contract not appearing upon the bond itself, or that an ill-merchandise had been made of them by attempting to put them in force for improper purposes; in which latter case the remedy was an application to a Court of Equity for an injunction to restrain their being put in suit.

It is true; that in some of the cases before that of *Eggle* and *The Bishop of London*; doubts had been thrown out as to the validity of general bonds of resignation; but in most, if not all the cases, special bonds for legitimate purposes, and amongst which the presenting the patron himself, his son, or as one of the cases has it, his friend, were held to be good. And it is surely quite evident that there is a manifest distinction between general and special bonds of resignation; inasmuch, as if the patron wishes to sell the advowson, it is made valuable, if by means of a general bond of resignation the purchaser can at any time compel a vacancy. This cannot be in the case of a special bond like the present, but on the contrary, as in general the party intended to be presented is underage when the bond is given, the consequence of his being presented would be the putting in a younger life, which would generally render the advowson less valuable as an object of sale.

The

The first case with which I shall trouble your Lordships is that of *Jones v. Lawrence*, which is thus reported in *Cro. Jac.* 248. in *Trinity* term, 8 *Jac.* 1. twenty-one years only after passing the 31 *Edw.* 6. Dabt upon an obligation of 1000 marks conditioned, whereas the obligee had procured from Queen *Elizabeth* letters of presentation to the church of *Stratham*, and was to present *Lawrence*, intending when his son *John* should be capable, to procure another presentation of him to the said church, if the said obligor within three months after request upon his presentation, admission, institution, and induction to the said church should resign his benefice absolutely, that then the obligation shall be void. The defendant pleads that he was not requested; and issue joined thereupon, and found for the plaintiff; and moved in arrest of judgment, first, that it appears by the condition of the bond to be a simoniacal contract, and against law; and therefore the obligation void. *Sed non est allodatum*; for there doth not any simony appear upon the condition, and such a condition is good enough, and lawful; wherefore it was adjudged for the plaintiff. Afterwards a writ of error was brought upon this judgment into the Exchequer Chamber; and the principal error insisted upon was, that this condition is against law; for it appears upon the condition entered that it was for simony, which makes the obligation void. But all the Judges of Common Bench and Barons of the Exchequer held that the obligation and condition are good enough; for a man may bind himself to resign, and it is not unlawful, but may be upon good and reasonable reasons without any colour of simony; as to be obliged to resign if he take another benefice, or if he be non-resident for the space of so many months, or, as this case is, to resign upon request if the patron will present his son thereto when he should be of age

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capable to take it. But if it had been averred that it was *per colorem simonii*, viz. if he did not suffer the patron to enjoy a lease of the glebe or tithes, or if he did not pay such a sum of money, that had been simony, and it is possible might have made the obligation void. But as this case is, there doth not appear any cause to adjudge it to be void for simony. Wherefore the judgment was affirmed."

The doctrine in that case was adopted and acted upon in the subsequent case of *Badington and Wood*, in *Cro. Car.* 180.

"Debt upon an obligation conditioned, whereas the plaintiff intended to present the defendant to such a benefice, that if the defendant at any time after his admission, institution, and induction, at the plaintiff's request, resigned the said benefice into the hands of the Bishop of *London*, that then, &c. The defendant upon oyer of the condition, demurred generally, and this was argued by *Grinston* for the petitioner, and by *Callthrop* for the defendant, who showed that the cause of demurrer was for that the condition of the bond being to resign upon request of the patron, it is simony, and against law, so the bond void. But all the Court conceived that if the plaintiff had averred that the obligation was made to bind him to pay such a sum, or to make a lease or other act which appears in itself to be simony, then, upon such a plea, peradventure it might have appeared to the Court to be simony, and might have been a question whether such a bond for simony should be void. But as it is pleaded by way of demurrer upon the oyer of the condition, it doth not appear that there is any simony, for such a bond to cause him to resign may be good, and upon good reason and discretion required by the patron, viz. if he be non-resident or takes a second benefice by a qualification or the like; and a precedent was shown in *Octavo*

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Jacobi betwixt Jones and Lawrence, where such a bond was made to resign a benefice, upon request, when the son of *Jones* came to be twenty-four years of age, to the intent that he might be presented unto it, and it was adjudged good in the King's Bench, and affirmed in a writ of error in the Exchequer Chamber; and of this opinion was all the Court, whereupon judgment was given for the plaintiff. *Hutt. S.C.* accordingly; and says that upon error brought in the Exchequer Chamber the judgment was affirmed. *Jo. 220. S.C.* accordingly; and that it was affirmed in error, upon viewing the precedent of *Jones v. Lawrence*."

In an anonymous case, reported in *12 Mod. 504.*, in which a general bond of resignation was held good, although Mr. Justice *Powel* states his opinion that when first the Judges held these bonds good, if they had foreseen the mischief of them, they would have been of another opinion, yet he considers that the patron having a son of his own, who may be capable of a benefice, is an honest intent. And *Blencow J.* says, "Here is a particular circumstance why it should not be thought simony here, because it is in a sum much above the value of the benefice; if, indeed, it had been for a sum of less value, it might be intended perhaps that the parson would rather pay than resign: and he remembered Justice *Twisden* said he had known such a bond held good twelve times, so it would be hard to oppose it now, there appearing no simony in the condition, the defendant not averring any."

What proportion the penalty in this bond of 12,000*l.* bears to the value of the living does not appear, but it must be taken for granted the bond was *bond fide* given for the purpose mentioned in the condition:

"If it were really colourable, and the real intention was that there should be no resignation, but that the patron

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patron should receive the penalty, it should have been pleaded.

There is another case of *Hilliard v. Stapleton*, b. Eq.

Cap. lib. 88, which is thus reported: "The guardian of an infant presented to a living, and took a bond from the incumbent to resign within two months after request of the patron or his heirs, it being designed that he should have the living himself when capable. The patron afterwards died an infant at the university, leaving two sisters his heirs, who pressed the incumbent to resign, and for not doing it put the bond in suit and recovered judgment, and this bill was brought to be relieved against the bond and judgment, and it was proved in the cause that they had treated with the incumbent to sell him the perpetual advowson, and had said that if he would not give 700*l.* for it they would make him resign. Lord Keeper said the proof in this case lies on the Defendant's part, and unless they make out some good reason for removing him, he should certainly decree against the bond. Bonds for resignation have been held good in law. The statute of 31 *Eliz.* against simony, made the penalty upon the lay patron, and he did not remember any case of resignation bonds before that statute, and they have been allowed since only to preserve the living for the patron himself or for his child, or to restrain the incumbent from non-residence or a vicious course of life, and if any other advantage be made thereof it will avoid the bond, and where it is a general for resignation yet some special reason must be shown to require a resignation, or he would not suffer it to be put in suit. If it should not be so, simony will be committed without proof or punishment. A particular agreement must be proved to resign for the benefit of a friend that would be presented, and without such agreement the bond ought not to be used but for misbehaviour of the parson; and here are proofs in this case

of endeavours to get money out of the Plaintiff.

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A perpetual injunction against the bond was dissolved, and satisfaction to be acknowledged upon the judgment, and the plaintiff to give new bond of 300*l.* penalty to resign, but that not to be sued without leave of the Court." *Cunningham*, 20. It is difficult to say why there should be a new bond, the party who was intended to be presented being dead; and in *Anders*, 368.

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the Lord Chancellor is stated to have said, that the Lord Keeper went too far; but I cite the case, to show that there was then no idea that a bond to resign for a son, or even a friend of the patron to be presented, was illegal, the only ground of applying to the Court of Chancery being the ill use that had been made of it.

So in *Peele v. Capel*, Str. 534. *Cunningham*, 21.

"*Capel*, on presenting *Peele* to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of age, instead of requiring a resignation, it was agreed between them all that *Peele* should continue to hold the living, paying 30*l.* per annum to the nephew.

Peele makes the payment for seven years, but refusing to pay any more, the patron puts the bond in suit, and then *Peele* comes into this court for an injunction, and to have back his 30*l.* per annum. On the hearing the Chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on account of the ill use that had been made upon it; and as to the money, it being paid upon a simoniacal contract, he left the plaintiff to go to law for it."

These are all the cases respecting special resignation bonds which I have met with before the decision of *Rytch v. The Bishop of London*. I proceed now to those which have arisen during the succeeding period of forty-three years.

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The first is *Bagshaw v. Bossley*, 4 T. R. 78., which was an action on a bond given by the defendant, on his appointment to the curacy of the free chapel of *Wermhill*, in the county of *Derby*, which, — after reciting that the defendant had agreed to be constantly and duly resident at the curacy-house there, and in default of such residence to resign and deliver up the curacy within one month after request or notice in writing left at the curacy-house, so that the patron might present anew, — was conditioned for such resignation, in default of such constant and due residence, (so that the patron, the obligee, might present anew, discharged of all charges and incumbrances done and suffered by the obligor,) and for the not committing waste or dilapidation upon the houses or lands belonging to the curacy.

To this the defendant pleaded several pleas: first, that he had resided on the curacy, and had not committed or suffered waste or dilapidation. Secondly, that after his appointment to the curacy he had a general licence from the obligee to reside elsewhere.

Replication, first, that the defendant voluntarily absented himself from the 7th day of *April* 1790 to the 8th *April* following, and that the patron had given him notice to resign, which he had refused to do. Second, that after the time when the supposed licence was granted, viz. on 7th *April* 1790, the plaintiff countermanded, and revoked the licence, and that the defendant absented himself, &c., as in the former replication.

To both these replications there was a general demurrer. *Sutton*, in support of the demurrer, contended, first, that the bond was illegal and void; and, secondly, that the licence was general, and could not be revoked. First, the bond is illegal, because it placed the incumbent under the undue control of the patron after the presentation, and after the relation between them had ceased, and a new relation had sprung up between the
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incumbent and the ordinary, to whom only he owed obedience.

The right of presentation in the patron is a public trust, and not a mere private interest. The duties of the incumbent are prescribed by the municipal law, and the canons and ordinances of the church; and, therefore, it was not competent to the patron to impose any private condition of his own creating, beyond those which the civil and ecclesiastical law have deemed it necessary to require.

With respect to the residence required by the bond, that is carried much farther than the law requires it; for the statute of *H. 8.* only imposes certain penalties, much inferior to that imposed by this bond for non-residence; and besides, there may be various defences to an action upon that statute, as, amongst others, residence upon another living by dispensation; whereas there can be no excuse, unless the licence of the patron be such; and further, in this case, the living itself is to become vacant.

Again, in this case the penalty is to become due to the patron in case of dilapidations in which he has no sort of interest, that being the sole concern of his successor.

The effect, therefore, of this bond is to raise in the patron a special interest in the exercise of a public trust which by law he was not invested with.

Chambre, contra, was stopped by the Court.

Lord *Kenyon*. I cannot bring myself to entertain a doubt upon this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest, for it is a subject of conveyance for a valuable consideration, which is not the case with a naked trust. As soon as the defendant was presented to the living, he was bound to take upon himself all the duties

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duties of an incumbent, to reside upon the living, to take upon himself the cure of souls, and to keep the house in proper repair. Now this bond was only entered into for the purpose of securing a performance of all these duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of *The Bishop of London v. Fletcher*. When that question comes again before the House of Lords, they will, I have no doubt, review the former decision if it should become necessary. It is sufficient for me in deciding the present case to say, that it cannot be governed by that, for here the plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties which in morality, religion, and law he ought to do.

I am, therefore, clearly of opinion that a bond for the performance of these duties is not illegal.

Buller J. I cannot find any immorality or illegality in this bond. It is the duty of the incumbent to reside on his living, and to be regular in the discharge of his duties. Now this bond requires nothing more, it only requires him to do what the law would have compelled him to do without it.

Grise J. was of the same opinion.

Ashurst J. absent.

Although in this case the bond was not for resignation in favour of the son of the patron, or any relation becoming capable and desirous of taking the living, yet it amounts to a decision of the Court that the giving a special bond of resignation is not in all cases illegal.

The next case was precisely in point with the present. It is *Partridge v. Whiston*, 4 T. R. 359.

The condition of the bond, after stating a presentation of the defendant to the rectory of *Cranwick*, and the vicarage of *Methwold*, in *Notfolk*, recites an agreement to be personally resident in one or other of these parishes,

parishes, or in *Northwold*, which is contiguous to both, without absence for eighty days in any one year, to serve the cure of these two parishes himself, if his health would permit, and not to serve the cure of any other parish while he held those; that as the two livings together were a comfortable provision for one clergyman, though neither of them separately was such, the defendant had agreed never to resign one without the other; that the plaintiff had a son about fourteen years of age, who probably would take orders, and might be desirous of taking these livings, and therefore the defendant had agreed in that event to resign both the livings in three months' notice to be given by the plaintiff, in order that the plaintiff's son might be presented thereto.

The bond was conditioned to perform this agreement, and to keep in good repair the rectory-house and chancel of *Cranwick*, and the vicarage-house of *Methwold*.

The Court understanding that it was intended to carry this case up to the House of Lords, gave judgment for the plaintiff without hearing any argument. They said, that as this case was not precisely similar to that of *The Bishop of London v. Fytche*, they were bound by the established series of precedents to give judgment for the plaintiff.

I do not find that the case was ever carried farther.

The next case is not one on a resignation bond, with respect to an ecclesiastical benefice, but I cite it for the purpose of showing the opinion of Lord *Kenyon* on the point now in question. It is the case of *Lesh v. Lewis*, 1 *East*, 391, where the patron of a school had taken a general resignation bond on the appointment of the master. Lord *Kenyon* said, in the instance of ecclesiastical livings every rector has a freehold in his rectory, yet it was never doubted but that resignation bonds for certain purposes, and up to a certain extent at least,

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least, were binding; though they put an end to the freehold.

Lawrence J. doubted whether the appointment could be made otherwise than for life. But he says, it is true, that a bond may be taken to enforce the observance of those duties which by law are required to be performed by the appointee of an office; but then it should be so expressed in the condition.

In 3 *Bos. & Pull.* 231. this case is reported in the Exchequer Chamber, and judgment affirmed without argument, it not sufficiently appearing on the record that the office of schoolmaster was such as ought to be deemed a freehold office.

In *Newman v. Newman*, 4 *M. & S.* 66. upon a bond to pay certain sums of money on the conveyance of an estate to the obligor, and in case a living should become vacant during the life of the son of the obligee, and he should be qualified, to present him, and if he should be under age, and it should be necessary to present another, to procure such other to resign when the son should be of age, it became unnecessary to decide whether the latter part of the condition was good.

Le Blanc J. says, the reason for making an exception in favour of a condition for presenting a son, might be because it was not for a money consideration.

Dampier J. If a bond to resign in favour of a particular person were necessarily void, the objection would have been good in *Jones v. Lawrence*. But a stipulation to resign in favour of a specified person does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. I know that since the case of *The Bishop of London v. Eytche*, it has been considered that bonds of resignation in favour of specified persons are not illegal.

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Lord Kircudbright v. Lady Kircudbright, 8 Ves. 51.
 Bond to pay Plaintiff 100*l.* a year until he shall be instituted and placed in possession of a living in the church of *England*; then to pay him so much as with the value of the living shall amount to 150*l.*

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Agreement by Lord *K.* to enter into orders and take the living, and if he did not, bond to be of no avail.

The obligor having died intestate, the obligee filed a bill praying an account, and that the arrears of his annuity might be paid him.

The Lord Chancellor expressed great doubt as to the validity of the bond, observing, that it was void on many accounts. It is, he says, a corrupt agreement for taking holy orders, such as the Court ought to decree to be delivered up. The policy of the ecclesiastical constitution of the country requires that a man should take orders without any reference whatever to considerations of that nature. There is no objection to the bond itself, except as connected with this agreement at the same time for a pecuniary consideration to take holy orders. Another objection to the bond is, that the father is put under these circumstances, that he is to solicit the benefit of patronage for this pecuniary consideration moving from himself, the policy of the law supposing the patron to look out for persons the best that can be recommended to him; which excludes pecuniary considerations. The cause stood over, in order that this point might be considered.

It was ultimately decided that the obligee had not performed the conditions, inasmuch as he had only taken deacon's orders, and had not answered whether he meant to enter into priest's orders.

That case contains no decision upon the validity of special resignation bonds, though the Lord Chancellor, speaking of resignation bonds in general, states himself to have no doubt that they were generally against the

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policy of the law, and says, that the question of their legality would never have perplexed him if there had not been so many authorities.

In *Dashwood v. Peyton*, 18 Vesey 27., a bond of resignation had been given in favour of a particular individual and not to accept a bishopric.

The application was for an injunction, principally on the ground that the bond as to the resignation, which had been given in consequence of supposed directions in a will, had been so given by mistake, it having been afterwards discovered that it was intended by the testator, that the party should be presented without any such obligation.

The Lord Chancellor said, it was very difficult upon the pleadings in the *Bishop of London v. Ffytche*, to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords made that decision: — but he adds,

“ It would not, however, become me, having regard to what is the present state of the law on this subject, to interpose in a court of equity, on the ground that this is a particular bond of resignation, although I agree that this Court, if it has a concurrent jurisdiction, is not bound to wait for the decision of a court of law. Yet a reasonable caution requires a court of equity not hastily to pronounce bad, a bond *understood* to be good at law; and it would, at least, be proper to leave that question to be reconsidered at law.” The injunction was refused.

The last case to be found on the subject is, *Ex parte Rainier; Rowlatt v. Rowlatt*, 1 Jacob and Walker, 200. The father on the marriage of his son gave a bond to trustees *inter alia* for performance of a covenant in the settlement, whereby he covenanted, that until the son should become the actual incumbent of the rectory of *North Renfret*, or should he be in the enjoyment of some other benefice or ecclesiastical preferment, which

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he might hold during his life of the yearly value of 600*l.* at the least, or until his death, he would pay him an annuity of 200*l.*

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The father having become a bankrupt, a petition was presented by the son and his trustees to prove in respect of the bond.

It appeared that the son had been presented to a living of 600*l.* a year, but had given a bond to resign in favour of two sons of the patron when either of them should be qualified and willing to be presented to it, and instituted and inducted.

The eldest son took orders, and the living was in consequence resigned within two years after the presentation.

It was contended that the son having been presented, the condition was satisfied.

On the other hand it was said, that having been presented on a condition to resign, and a bond given to that effect, it was a benefice that could not have been retained for life.

Lord Chancellor. "Still he might have held it for life; he might, if he chose, have kept the living and forfeited the bond. You may, however, if you like, take a case into the Court of King's Bench."

The reporter says, the matter stood over for the Plaintiffs to consider whether they would take a case, which they afterwards accepted; but it is understood that they have since declined to persevere in it.

I apprehend that such case could only have arisen upon the ground, that the Court of King's Bench would have held the bond legal; for if it was simoniacal, the party could not have held the living, even if he had paid the penalty, for the presentation would have been absolutely void, and, consequently, not a satisfaction of the condition.

CASES IN TRINITY TERM

I have now gone through all the cases, I can find respecting special resignation bonds, extending over a period of above 200 years, in none of which has such a bond been held bad; in many it has been expressly determined to be good, and admitted to be so in most of those in which the validity of general bonds of resignation has been disputed or denied. In one or two of the latest cases, indeed, in the Court of Chancery, it has been stated to be very difficult upon the pleadings in the case of the *Bishop of London v. Kytche*, to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords made that decision. The main principle upon which that decision turned, appears to me to have been the enabling the patron to have made a greater profit on the sale of the advowson, and the converting the tenure of the incumbent into a tenancy at will to the incumbent.

This I have already stated not to be applicable to the case of a bond to resign in favour of a particular person. The only objection applicable to a special in common with a general resignation bond, appears to be the reducing the tenure from an absolute freehold for life to one for a less period; but however that might be available if the objections had been made for the first time, it appears to have been too long acted upon and acquiesced in now to call it in question. Under these circumstances, therefore, can a court of law now judge that they are bad, particularly when it is considered that the consequence of holding them to be so must be to submit to severe penalties those who have been acting upon a practice of upwards of two centuries, and which has never yet been declared illegal, and in many instances expressly determined to be legal. These penalties, if the bond be considered as illegal under the statute

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statute of *Eliz.*, extending to the forfeiture of the presentation and two years' value of the benefice: . . . I

One word upon the statute: The provisions of it apply to any person, &c. who shall present or collate, for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sums of money, reward, gift, profit, or benefit whatsoever.

It is not contended that this case comes within any of the words of the statute, except the word *benefit*; and it is said, that a resignation bond in favour of a son is a benefit to the father, inasmuch as it relieves him from making any other provision for him, which he would otherwise be bound to do. To this I answer, that this is not the species of benefit which the statute contemplated; a general resignation bond may be so, as I have before stated; as it enhances the value of the living if sold during the incumbency, and amounts to a sale with the means of procuring an immediate vacancy; but if this be so considered, it would be equally a benefit when the father presents the son on a fair vacancy, or even where he presents himself. In either case, it may be said, he makes the presentations a means of providing for an expenditure he must necessarily incur, and, therefore, circuitously at least, a source of profit to himself.

The statute has never yet been intended to operate to that extent; and the observations made at the bar, that upon looking at the eighth section, the word *benefit* must be taken to mean a pecuniary benefit, and that the two clauses ought to have a similar construction, appear to me to be entitled to considerable weight.

It might perhaps be urged, that in this case it does not appear that the patron was bound to provide for his younger brothers, and, therefore it can be in no sense a benefit to the patron, which it is but fair to consider, the

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meaning intended by the statute to be applied to the word "benefit," coupled as it is with the words, "sum of money, reward, gift, or profit."

But it seems to me to be sufficient to say, the act has never been held to extend to bonds of this description; that, on the contrary, they have been uniformly held good in *Westminster Hall*, and that it would be contrary to the principle universally acted upon with respect to penal laws, viz. that they are to be strictly construed, now to extend it to them.

But it is asked, admitting a resignation bond in favour of a son to be good, to what degree of relationship and to what number of persons does the principle extend? To this I answer, that it must, like many other cases, depend upon what shall be considered reasonable.

With respect to the present case, such a bond in favour of a more remote degree of relationship than a brother has been held good; for in the case of *Peck v. Capel*, before cited, the bond was in favour of a nephew; and in *Bowlatt v. Bowlatt*, where the bond was in favour of two sons, when either of them should be qualified, no objection was taken on that ground; but on the contrary, a presentation accompanied by such a bond was considered as a satisfaction of the condition to pay an annuity until the party should be in the enjoyment of a benefice which he might hold for his life.

It is also to be observed, that the statute of *Bliss* is not confined to bonds and securities, but extends to any promise, agreement, grant, bond, covenant, or any other assurance. If therefore, the bond in this case is illegal and avoids the presentation, the same rule applies to every verbal promise or honorary engagement expressed, or perhaps when only implied.

Surely then it is necessary to pause before a decision is adopted, which may in its consequences involve in the guilt of simony and the penalties of the statute, parties than

that whom none would be more abhorrent from such an offence, into whose contemplation it could never for a moment have entered, that they were acting illegally in making or accepting resignations under circumstances sanctioned by the practice of centuries and the current of legal decisions, and who, from their peculiar station in society, would have been the last to have put themselves in the smallest hazard of having it imputed to them for an instant, that they had concurred in, or lent their sanction to any act, of the legality or propriety of which a doubt could be entertained.

Another objection taken to these bonds is, the oath taken upon institution; but this seems to me to be begging the question. The oath is: "I do swear that I have made no *simoniacal* payment, contract, or promise." Now before the giving of such a bond can be considered a breach of the oath, it must be determined that such a bond is a simoniacal contract.

Bishop *Gibson* contends, that this oath, whether interpreted by the plain tenor of it, or according to the language of former oaths in the notions of the Catholic church concerning simony, is against all promises whatsoever: (802.) And he states, that in the year 1801, in Archbishop *Courtney's* decree, the oath is: "Quodpote obligati non sunt, nec eorum amici pro se, juratpria aut pecuniaria cautione, de ipsis beneficiis resignandis vel perindtahdis."

But I should conclude, by the omission of this part of the oath in the Canons of 1603, it was intended that it should not longer be included, or at least, that it was considered as not being included; for in the Irish Canons, which were made thirty-one years afterwards, it was provided, that if any clerk, or other person with his consent, should seal any bond, or sell to any person or persons with condition of resignation of his benefice, he should be holden guilty of simony, and proceeded

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against according to the severity of the ancient customs in that behalf.

As another ground of objection to these bonds, it is asked, what power is there after the resignation made to compel the patron to present the person in whose favour it is made, or to compel such person to accept it; or having been instituted to prevent his resigning the benefice to a vendee immediately afterwards; and it is said, that neither the Bishop nor the Chancellor can compel such presentation to be made.

To this I answer, that the resignation is to be made to the Bishop. Upon its being tendered, he has a right to inquire into the reason of it, and upon finding it is in consequence of a resignation bond, or any other engagement to resign, he may say he will not accept the resignation, unless the patron comes at the same time prepared to make the presentation. Where the party to be presented is under age at the time the engagement is entered into, and as soon as he comes of age procures himself to be admitted into priest's orders, it is a pretty strong proof of his readiness to accept the living.

With respect to the second part, the offer to resign the living immediately, or within a very short period after institution, is a pretty strong proof of the resignation being obtained from an interested motive, and would probably induce the Bishop not to accept it. But the legality or illegality of the bond cannot depend on what course the Bishop would pursue; and the probability is, that he would not refuse to act according to what the courts of law have decided upon the question.

If any real inconvenience should be found, it would be in the power of the legislature to enact that the resignation shall be conditional only, and be void if the persons in whose favour it is made be not presented within a certain period.

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and it certainly has been determined that the party does all he can to comply with the condition, by tendering his resignation, yet if the bishop refuses to accept it, the bond is forfeited.

But upon this I would observe, that if where the incumbent has done all he can to perform his obligation, the bond is still put in suit, it can only be for an unlawful purpose; in that case, I apprehend, a court of equity would grant an injunction.

To the observation that it may be difficult or impossible to ascertain the fact, the answer is, that if there is any suspicion respecting it, a bill in equity may be filed for a discovery, and if the discovery does not render the party liable to penalties, it will be ordered.

This was done in the case of *The Bishop of London v. Fytche*, and it is remarkable that the noble and learned Lord, who so ably and so successfully combated the legality of resignation bonds, whilst he was in the profession adopted the doctrine of *Westminster Hall*, and had in that very case overruled a demurrer, which had been pleaded on the ground that a discovery might expose the parties to penalties, and which must have been allowed, had his Lordship then been of opinion that the transaction was illegal. The case as to this point will be found in *1 Brown's Reports in Chancery*, 96.

In the observations with which I have troubled your Lordships, and which have extended to a greater length than I could have wished, I have cautiously abstained from entering into the question how far bonds of this description are or are not consistent with public policy, and I have done so, because, however, if the case were new and doubtful, it might be proper to take this question into consideration; yet if the case is not new, but such bonds have been held good for centuries, as it appears to me they have been, it is now too late to consider that question

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question in a court of law, and if it is considered right to put a stop to them on the ground of public policy, the legislature are the proper persons to do so.

Were the case new, I am not prepared to say it might not be proper to prevent the giving of these bonds; but, if so, it seems to me that it would be the proper course to put an end to them altogether, and not make a distinction in favour of those which it has been said are good, because they only enforce the performance of duties which are required by law to be performed.

If the law requires the performance of a duty, why not trust the enforcing such performance to those authorities to which the law of the country has intrusted it, and who have the power of determining how far the rigid performance may or may not be relaxed or dispensed with? Why is it necessary to call in the assistance of the patron, and give him the power of enforcing it by a more severe punishment than the law would inflict, and the inflicting of which would confer an advantage on the patron which the ordinary process of the law would not give him?

With respect to one of the instances in which a bond of resignation has been allowed, viz. that of non-residence, I am not sure that the condition does proceed from so pure a motive as has been attributed to it. Take, for instance, the case of *Whiston v. Partridge*, before cited. The condition is, that the party shall reside without absence of *eighty days in any one year*. When it is considered that at the period this bond was entered into, absence of eighty days in the course of any one year put an end to any lease which might have been made of the tithes on any part of the benefice, one is compelled to conjecture there was some other reason for the insertion of that provision than the good of the church;

church, or the punctual performance by the incumbent of the duties of his situation.

I forbear, however, to say more upon this topic, because as it appears to me the practice of giving these bonds has too long prevailed, and has been too often recognized as legal, to permit it to be altered by any other than legislative authority.

For these reasons, and upon the most attentive and full consideration I have been able to give to the authorities which I have taken the liberty of laying before your Lordships, I feel myself bound to state my humble opinion in answer to the question put by your Lordships: that sufficient matter does *not* appear upon the record to show that either by the statute or common law the bond upon which the action of the Defendant in error was brought, stated upon the record to bear equal date with the writing of presentation therein mentioned, is void and illegal.

HULLOCK B. I am sorry that, in answering the question propounded by your Lordships for the consideration of the Judges, I feel myself, after much reflection and research upon the subject, compelled to state, that I have arrived at a different conclusion from that which is the result of the deliberation of my learned Brother who has just addressed your Lordships. I am happy, however, in being able to concur in the opinion which has been stated, and which I have reason to believe is the opinion, also, of all the learned Judges now present, that this record discloses sufficient matter to show that the bond in question was given in consideration of, and as and for the price of the presentation of the Plaintiff in error to the rectory of *Kettering*. I own, that for a considerable time, I felt much difficulty on this part of the case; because, although no plain unlettered men can peruse the condition of this bond without, as it seems to me, at once perceiving that such

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was the fact, yet still it appeared to me to be doubtful, whether that conclusion was more than inference; which, however well warranted in ordinary cases of construction, was yet insufficient, in the absence of distinct and positive averment, to warrant a court of law in acting upon it in a case where the question is, Whether the parties to the contract have acted in contravention or violation of the enactment of a penal statute? In all cases in which the charge involves in it a breach or violation of a penal statute, it is essentially necessary that the act charged should be brought by express and positive allegations within the language and letter of the statute: I apprehend, that if the Defendant below had in this case been advised to have pleaded specially, instead of suffering judgment to go against him by default, his plea would have shown by precise and positive allegation, that this bond was given in consideration of and for and as the price of the presentation, and that the presentation was made or conferred in consideration of and in return for the bond: a plea so framed would, if established in point of fact, have brought the case directly and unequivocally within the language of the statute of 31 *Eliz. c. 6. s. 5.*

Further reflection, however, and opportunities of conversing upon the subject, have satisfied me that it is abundantly clear, from the language of the condition itself, that this bond was given in consideration of and for the presentation, and that the presentation was made in consideration of the bond. In short, that this instrument was the result of barter and contract between the obligor and obligee, for and in respect of this living.

The condition commences with a recital that the obligee is the patron of the rectory of *Kettering*, which rectory was then vacant by the death of the late incumbent thereof; that the obligee had, *by writing under his hand and seal, bearing equal date with the bond, presented the obligor to supply the said vacancy, and to be rector, in order that*

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he might be instituted and inducted thereto; and that the obligee had agreed to resign the said rectory upon such request or notice, as thereafter mentioned, so as that the said rectory might thereby again become vacant, for the sole purpose that the owner of the advowson of said rectory might be enabled to present thereto anew, either one of two brothers of the obligee therein specifically named, when the party to be presented should be capable of taking an ecclesiastical benefice.

Now can any person, after reading these passages, from the condition of the bond, have a doubt of the nature and character of this contract? Assuming, then, that it is sufficiently evident, by the matter spread on this record, that the bond in question constituted the consideration for this presentation, is it an instrument avoided by the statute of 31. Eliz. c. 6.? By the fifth section of that statute, "If any person shall or do, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person to any benefice with cure of souls, or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation and every admission, institution, and induction thereupon, shall be utterly void and of none effect in law." And the act then proceeds to subject the parties to certain forfeitures and incapacities.

By the word *corrupt*, as used here, and as applied to this subject, it is quite clear, that every presentation which is not *gratuitous* is *corrupt*. By the former part of the clause presentations for money, &c. are prohibited; and by the latter part of the section, presentations made for such *corrupt* cause are avoided, clearly considering such cause, that is, a bond, &c. made for a pre-

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presentation, to be a corrupt cause; and the statute was intended, as appears by the preamble to the fifth section, which is printed incorrectly at the end of the fourth, for the avoiding of simony and *corruption* in presentations to benefices, &c.

It may be observed, that the statute does not in express words avoid the bond itself, but merely the presentation made in consequence of or under it. But still, upon general principles of law, I conceive it to be quite clear, that a bond made for the purpose of furthering an object prohibited by a statute is void, and can never be made the foundation of an action. And this doctrine is laid down in the clearest manner by Lord Holt, in *Bartlett v. Vinor, Curth. 251*. In that case that learned Judge expresses himself thus: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute; as, for instance, in the case of simony, the statute only inflicts a penalty by way of forfeiture, but doth not mention any avoiding of the simoniacal contract; yet it hath always been held that such contracts being against law are void."

The enquiry then will be, whether a bond of this description be *a benefit*, either directly or indirectly to the patron, because if it be, it will fall immediately within the words and operation of the statute, and any presentation made for such a bond will be void.

It is denied that this security is either a profit or a benefit within the true spirit and intendment of this clause of the statute.

If your Lordships should sustain the judgment of the court below, the obligee would be entitled to take out execution upon his judgment for the sum of 10,000*l.*,

with

with his costs of suit. A right to enforce the payment of such a sum of money looks like a profit, like a benefit. It appears difficult to raise a serious doubt upon the question. Is the possession of a special bond of resignation a benefit to the patron? The opportunity afforded by this species of bond of providing for a son, or a brother, or relation, must surely be considered a benefit to a patron. If it be a benefit, how has it been acquired? Why, by means and through a corrupt bargain for the presentation.

But consider this contract in another point of view. It is not compulsory on the obligor to resign; he has an option either to do so or pay the penalty. And, as has been well observed [*per Eyre B. Cunn. 94.*] is the chance that the obligor, who may, will so elect, worth nothing to the obligee? The obligor may resign or pay the money; and the obligee cannot, at all events, compel him to resign. If that be so, what would be easier than the making of this species of contract the means of selling an advowson during an actual vacancy? The value of the living is calculated, a bond is given for the amount conditioned to be void on request when a certain specified individual has become capable of taking the living. That event happens almost immediately by the insertion of a person who if he lived would within a very few months become capable of holding an ecclesiastical benefice. The incumbent is called on to resign; he refuses, but prevents a suit on the bond by paying to the obligee the amount of the penalty; would such a proceeding, *legal* if this bond be legal, operate a benefit to the patron for and in respect of his presentation? But whether the money or the resignation of the living is obtained, the obligee acquires to himself a benefit, in every sense of that word, for his presentation.

It has been, however, argued, as it was said in *The Bishop of London v. Elytche*, that the word "benefit" in

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in the sixth section of the Act, and cannot be construed according to its ordinary meaning, inasmuch as such a construction would have the effect of rendering the 3d section of the statute nugatory. The answer to that sort of reasoning is given by Mr. Baron Eyre, in the case of *The Bishop of London v. Ely*. It appears to me that the word "benefit" in the eighth section of the act must receive the same meaning as it possesses in the sixth clause of the act. The word *benefit* in the eighth section means something *valuable*, something in addition to the *value of the thing exchanged*. In exchanges neither living can be considered as better or worse in legal intendment, because they are in the estimation of those that make them perfectly equal; however other persons may differ upon the subject. Mr. Baron Eyre puts the case thus: "A living in the air of *Berkshire* may be reckoned an equivalent for the difference of an incumbency in the hundreds of *Essex*. That is a fair argument; each man throws into the scale circumstances which establish a perfect equilibrium in cases of exchange between parties. In a case where there is not a single shilling passing, if there is any other *extrinsic benefit* whatsoever to the smallest amount, it is made a part in the consideration of such exchanges; and there is no question upon this act of parliament, such exchange will be void." Since the decision of your Lordships in *The Bishop of London v. Ely*, we are bound to say that a general bond of resignation is bad in point of law. That decision must have proceeded either on the ground that such a bond was a benefit to the patron, and therefore prohibited by the statute, or that such a bond was void on grounds of public policy; viz. that it was contrary to the policy of the law, it permits the incumbent office to be placed under such a bond, as would necessarily result from such an instrument.

Juris, 1 *Butt*, 308., *Le Blanc J.* says that the decision in *Bishop of London v. Hytch* against the validity of general bonds, turned ultimately on the ground of their being simoniacal and against the statute. If the decision attuded to proceeded on that ground, then I would humbly ask on what principle or ground of reason can the effect of the bond now in judgment be distinguished from the effect of a general resignation bond? The benefit or value of the two bonds may differ in amount or degree. A special bond may not be so beneficial, so valuable as a general resignation bond; but that is a mere difference in the degree, not a difference in the nature, or essence, or character of the instrument. I am unable to comprehend any other way in which a difference can be predicated between these two descriptions of bonds; no ingenuity, no subtily that can be employed on the subject can succeed in establishing any other distinction between general and special bonds of resignation; and if the facts disclosed upon this record are adverted to, the absolute identity of these bonds in principle and operation will be most palpable; one of the nominees in the bond is now competent to hold an ecclesiastical benefice, but the patron cannot be compelled by any mode or way which any lawyer can point out, to make the request, or give the notice mentioned in the bond. That being the case at the commencement of the suit below, the obligor stood precisely in the same situation as an obligor in a general bond would do in the moment after he had executed that description of bond.

If, then, general bonds of resignation were decided to be bad, as being contrary to the statute of *Elizabeth*, on the ground of their operating as a benefit to the patron, it seems to me more than difficult to contend with success that a special bond operating in the same way can be supported as an efficient instrument. If both species of

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bonds operate as benefits to the patron, though not to the same extent in point of value, they still must operate equally in violation and contravention of the provisions of the statute.

But it has been argued that, admitting the case of *The Bishop of London v. Ffytche* to be law, yet, inasmuch as it was decided, as it has been strenuously alleged, in direct contravention of a long train of decisions in the courts below, your Lordships will not be disposed to carry that case beyond the strict letter of the decision, and that therefore your Lordships will restrict it in operation to general bonds of resignation merely.

In confirmation of this view of the subject, it is said that special bonds of resignation have been holden valid and unimpeachable at several times, and by several Judges, and in several decisions in the courts below since, and notwithstanding the determination in *The Bishop of London v. Ffytche*. It cannot be dissembled that since the decision so often referred to, resignation bonds with special conditions have been treated on several occasions as legal instruments in the courts below. It may be therefore material to advert to the modern cases in which this question has been agitated, and it will be found, and it is a most singular fact, that in no case since the determination in *The Bishop of London v. Ffytche* has the construction of the statute of Elizabeth ever been the question before the Court.

The first case of which I am aware in which *The Bishop of London v. Ffytche* is mentioned is *Bagshaw v. Bossley*, clerk, M. 31 G. 3. 1790. 4 T. R. 78. That was a bond given by the incumbent to the patron on presentation to reside on the living, or to resign it if he did not return to it after notice, and also not to commit waste, &c. in the parsonage-house; and it was held good. In the judgment, Lord Kenyon said this bond was only entered into

into for the purpose of securing a performance of all those duties which by law, and without the bond, he was bound to discharge. He then proceeded thus: "I avoid saying any thing about the case of *The Bishop of London v. Fytche*; when that question comes again before the House of Lords, they will, I have no doubt, review the former decision if it should become necessary. It is sufficient for me to say that this case cannot be governed by that." Mr. Justice Beller said, "I cannot find any immorality or illegality in this bond. It is the duty of an incumbent to reside on his living, and to be regular in the discharge of his duty. Now this bond requires nothing more. It only requires him to do what the law would have compelled him to do without it."

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The next case is *Partridge v. Whiston*, clerk, 4 T. R. 369. T. 31 G. 3. That was debt upon a bond conditioned to reside; to resign, for the patron's son to be presented; and to keep the premises on the living in repair. In this case the defendant pleaded two pleas to the bond, and the question now before your Lordships might, as it would seem, have been raised on the first special plea, which set out the condition upon oyer, and then in effect averred that the presentation was given in consideration of the defendant's entering into the bond to resign the living upon the plaintiff's son taking priest's orders. To this plea there was a demurrer and joinder. But the Court, understanding that it was intended to carry the case up to this House, gave judgment for the plaintiff without argument. They said, that as this was not precisely similar to *The Bishop of London v. Fytche*, they were bound by the established series of precedents, to give judgment for the plaintiff. In this case, therefore, the construction of the statute of *Elizabeth* is never once thought of.

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The next case to which I wish to call the attention of your Lordships, though not in order of time, is that of *Newman v. Newman*, E. 55 G. 3. 1815; 4 *Masb. of Selwyn*, 66. That was debt on bond, conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church the advowson of which belonged to the estate, if he were then of age to take it, or if not, to procure the person who should be presented, to resign upon notice of the son's being qualified to take it, and to present him. These facts appeared on oyer of the bond, and were alleged to be simoniacal. Demurrer made, and joined: and the Court decided, that as the bond was conditioned for the performance of several things, some of which were good, the bond was valid, although one of them might be void at the common law. After argument, Lord *Buzborough* said, "What the effect of a bond of resignation in favour of a son might be, was not, I believe, touched upon in *The Bishop of London v. Ffytche*, though, perhaps, it might be argued, that there is no reason for any distinction, because a parent would be more open to prejudice and improper bias in favour of a son, than of any other person." Lord *Blanc J.* said, "that the reason for making an exception in favour of a condition for presenting a son, might be because it was not for a money consideration." Lord *Dampier J.* "A stipulation to resign in favour of a specified person does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent a mere tenant at will to the patron. I know that since the case of *The Bishop of London v. Ffytche*, it has been considered that bonds of resignation in favour of certain specified persons, are not illegal." In this case the judgment is given on that part of the condition of the bond which was holden good, and no judgment was given

given on the part of the second, applicable to this question. And the opinion of Lord *Ellenborough*, seems rather against the validity of special bonds of resignation, as not distinguishable from general bonds. Mr. Justice *Le Blanc*'s opinion proceeds entirely on the ground of a special bond of resignation not being for a money consideration, and, therefore, not bad. — The statute law is not confined to money considerations. — Mr. Justice *Dampier* seems to consider special bonds good, but his reasoning is equally applicable to both descriptions of bonds; and if his reasoning be correct, this bond is bad, because clearly here the obligor is at this moment tenant at will to the patron.

In *Lugh v. Lewis*, 1 East, 391. E. 41 G. 3, 1801, this species of bond was touched upon, though not the point in judgment. That was the case of a bond given by a schoolmaster of an ancient public school, who had, as it was said, a freehold in his office, to resign at the request of his patron. The Court held the bond good. The question arose upon a demurrer to a plea, which, after over stated all the facts on the record. In giving his judgment, Lord *Kenyon* says, "I never can admit, that at common law a general resignation bond of an office is illegal, although the party may have a freehold in the office. In the instance of ecclesiastical livings, that is universally the case; every rector has a freehold in his rectory, yet it was never doubted but that resignation bonds for certain purposes, and up to a certain extent at least were binding, though they put an end to the freehold." *Lawrence J.* expressed great doubts on this question. *Le Blanc J.* agreed with Lord *Kenyon*, that the bond in that case was good; he thought it fell within the principle of the former determinations, that general bonds of resignation were good at law. I shall, however, have occasion to advert again to this decision.

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I am not aware of any other case upon this subject. From this review of the modern cases, it is quite impossible to say that any question concerning the validity of special bonds of resignation has ever come neatly before any of the Courts below, with the exception perhaps of *Partridge v. Whiston*, in which a formal judgment was given in support of such a bond without argument, for the purpose of a writ of error. What became of that case I do not know. It has been seen then, that no well grounded argument in support of a special bond of resignation can be drawn from modern cases; and it will be found, I believe, that the more ancient ones are equally destitute of *general reasoning* on the subject. If any one will take the trouble of toiling through the old cases on this matter, he will not find, I believe, any decision in which the validity of either species of bond has been discussed or argued on general reasoning, either on the statute or at common law.

For these reasons, therefore, it appears to me that I ought to answer the question proposed to the Judges, in the affirmative, that sufficient matter appears upon the record to show that *by the statute law* the bond in question is void and illegal. But assuming that the decision in *The Bishop of London v. Efsche* proceeded on the ground, that the bond in that case was void, as being contrary to public policy, although it might not be a benefit within or contrary to the provisions of the statute of *Elizabeth*, I am disposed to maintain that the bond in this case operates equally against public policy, and is, therefore, on that ground, equally void and illegal.

Bonds of this description had no existence at the common law, because it was not until a period long subsequent to legal memory, that the right of patronage in the manner in which it now generally obtains,

tains, had its origin. But still these bonds, if they operate to the prejudice or detriment of the public interests, are contrary to the common law, inasmuch as every bond or contract which operates against the public convenience, or to the public prejudice, is, upon the principles of the common law, void, and of no effect. This doctrine is familiar to every one, and is recognised and illustrated in *Collins v. Blantern*, 2 Wils. 347.



If no authorities could be found on the subject, if the question were *res integra*, few persons, I think, would contend that this species of instrument, given in consideration of and for the presentation to an ecclesiastical living, is capable of being supported on sound principles of law.

Before *The Bishop of London v. Fytche* numerous cases occur in the books upon the subject, but no one of them, as far as my researches enable me to speak, contain any reasoning or argument in support of these bonds; the authority of these cases seems to depend mainly upon tradition — certainly more upon positive authority than good reasoning. In the latter cases the Judges, whilst they seem to admit, that if the question were new, the validity of these instruments could not be supported, divide upon authority merely, and refuse to hear any arguments upon the subject.

In 12 *Mod.* 505., Mr. Justice *Powell* expresses an opinion against resignation bonds, if the authorities had not bound him. He says, that when first the Judges held these bonds good, if they had foreseen the mischief of them, they would have been of a contrary opinion. The same opinion is expressed on this subject by Mr. Justice *Buller*, in *Bishop of London v. Fytche*. When that case came before the Court below, 1 *East*, 494., and afterwards, when that case was before your Lordships, the same learned Judge says, that he had taken no small pains to find out upon what principle all the

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cases had gone, but without much effect; for after all the labour he had bestowed upon the subject, it seemed to him they were destitute of all sense, reason, or principle. And in *Legh v. Lewis*, Mr. Justice Lawrence, says, speaking of general resignation bonds, it must be admitted, that if it were a new question at this day, it would be very difficult to say upon principle that such bonds would be legal. And an opinion in accordance with those to which I have just adverted, has been oftener than once expressed by the highest living authority; on several occasions, the noble and learned Lord to whom I allude, has expressed himself unfavourable to those bonds upon principle. (He has declared, that the only perplexity he has experienced on the question, has arisen from the authorities. No one who has taken the trouble of wading through the cases which are to be found in the books upon the subject of bonds of resignation, will, I think, be disposed to question the accuracy of the conclusion at which Mr. Justice Buller states himself to have arrived from a perusal of those cases. That learned Judge declared that the cases appeared to him to be destitute of all sense, reason, or principle; your Lordships are, however, vehemently called upon to form your decision, upon the present occasion, on the authority of cases destitute of sense, and reason, and principle.

With respect, however, to general bonds of resignation, the more ancient cases no longer exist as authorities upon the subject; and upon what view of the subject can either the ancient or modern cases be considered as authorities in support of special bonds of resignation? I would ask upon what principle can a special bond of resignation be sustained? I mean with reference to public policy. It may be worth while to advert for a moment to the nature and extent of the

binding a law, and not having any effect in the estate

estate and interest which a rector has in point of law in his rectory, after institution and induction.

Few lawyers will be disposed to deny, that by institution and induction a rector becomes seised of a freehold estate for his life, in the parsonage-house, the glebe, and the tithes of his rectory. The authorities are numerous and uniform on the point; *Wals.* 387; *Gals.* 661., *Cro. Jac.* 367., *Noy*, 104.: so distinctly stated by Lord Kenyon, in *Leigh v. Lewis*; by Lord Thurlow in *The Bishop of London v. Elyche*.

In pleading, which is the best evidence of the law, a rector states that he is rector, &c., and as such rector that he was and thence hitherto hath been, and still is seised in his demesne, as of freehold in right of his said rectory, of and in the tenements, &c. &c. If a rector, by virtue of institution and induction derives an estate for life, from whom does he derive it? not from the patron, but from the ordinary. The patron has purely the right of nomination or presentment. That is the whole of the *ius patronatus*. The office is not in any sense conferred by the patron; it proceeds entirely from the act of the bishop. Then upon what principle can it be justified at common law, that the patron shall be permitted to exact a security in derogation of this freehold estate, the effect of which will be the converting a life estate into an estate at will. In *Bishop of London v. Elyche* Lord Thurlow asks, "whether a bond of resignation given by a Judge or a Master in Chancery would be good?" He says, a Master in Chancery is an officer appointed for life. Suppose the Chancellor has the appointment, and suppose such Master gives a bond to resign when called upon, would that bond be good at common law? NO; because it is not only contrary to the constitution of his office, but because the public has an interest in the independence of that officer, as being appointed for life, and a public law

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law officer. His place is independent, it being *quandis se bene gesserit*. If he is an officer for life, how can any private man whatsoever, because it is his province to appoint him, take upon him to render that officer's situation what the law says it shall not be? He apprehended it would be extremely difficult to justify those bonds." This reasoning is applicable *à fortiori* to bonds like those now under consideration, and the difficulty of supporting a bond of resignation, which in effect reduces a freehold office to a mere estate at will, is adverted to by Mr. Justice *Lawrence* in *Legh v. Lewis*. I have already had occasion to observe, that that was the case of a bond of resignation by a schoolmaster. There, Mr. Justice *Lawrence*, after observing that it did not precisely appear on the pleadings whether the office was a freehold office, says that he had considerable doubts on the question, how far the person who has the power of such appointment could exercise it in a different manner from what the founder intended.

It may be added, that when the case of *Legh v. Lewis* came on for argument afterwards, on a writ of error in the Exchequer Chamber, the Court were clearly of opinion that it did not sufficiently appear on the record, that the office of schoolmaster was such an office as ought, for the sake of the public, to be deemed a freehold office; and that, therefore, it was impossible to raise the important question, which it was the intention of the parties to litigate; upon which question they declined giving any opinion. Hence it may be collected, that in the clear case of a freehold, (like the present case,) the validity of such a bond was considered (by the court of error a question of great difficulty and importance. And the difficulty of establishing a bond to resign a freehold office at the instance of the person making the appointment, is suggested in *Layng v. Paine, Waller*. 571. That case, it is true, arose on the statute

statute of 5 & 6 Edw. 6. c. 15. against the sale of offices, but still the language of the Lord Chief Justice is extremely applicable to this subject. He says, "I think this is a void condition: (a condition to resign the office of registrar of the archdeaconry of *Wells*;) For the donor to oblige the officer to surrender whenever he requires it, is to reserve to himself an absolute power over his officer, which he ought not to do; besides, if this were allowed, there would be a plain method chalked out to evade the statute, for any one by this means might sell an office for its full value;" and such, indisputably, would be the consequence of supporting the present bond. In *Newman v. Newman*, 4 *Maule & Selwyn* 71., in speaking of a special bond of resignation, Mr. Justice *Dampier* observes, that such a bond does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. Now, if that reasoning be sound, it applies directly to the facts disclosed on this record. It is averred, that one of the nominees in the bond has become capable of taking an ecclesiastical benefice: of consequence, the time has arrived at which the obligee may call for a resignation according to the condition of the bond. But the obligee is not therefore obliged to take that step, he may do so, or he may let it alone. If that were so at the time of the commencement of the action in the court below, the obligor was a mere tenant at will to the patron. If he be allowed to retain the living, he would do so by the permission of the patron, and he would hold it on the tenure of the patron's mere will and pleasure. Can any one then seriously contend, that the condition of this bond which places the incumbent in such complete thralldom, under so absolute a dominion and restraint, can be supported upon any known or recognized principle of law? The inevitable consequences of such a state of things are too palpable

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palpable and gross to be dwelt upon for a moment; such a bond must necessarily operate to the prejudice, if not the total subversion of the true and essential interests of religion.

Suppose the clerk should resign in conformity to the condition of a bond of this sort. What obligation is there upon the obligee to present the individual specified in the condition? None. He may give the living to a stranger, and if the patron should present a stranger to the living, would the obligor have any remedy, either at law or in equity against the obligee for the non-presentation of the nominee in the bond. I should be curious to learn the precise species of remedy or redress to which an obligor would, under such circumstances, be entitled. Again, there is no obligation upon the nominee to accept the living if it should be offered to him.

How can a clerk, after entering into a bond of this description, honestly take the oath which is administered to him previous to institution, (*Gibb.* 802, 810.) How can he sign his resignation in the form usually adopted (*Gibb.* 1518.) if the ordinary permit him to resign, which, by the way he is not bound to do. The words of resignation, according to *Gibson*, (page 851, 1518,) are "*Per verba scientia pure sponte simpliciter et absolute resigno.*"

If the acceptance of the ordinary be necessary to give effect to the resignation, the undertaking of a clerk to resign a benefice is an undertaking which he has no power of himself to perform, because it depends on the ordinary whether he will accept the resignation or not.

Another objection arises on the ground of general policy to this species of instrument. The patron becomes thereby precluded from choosing the fittest and most proper individual for supplying the living. If he has not the presentation according to the condition of the

bond, his choice is fixed long before the fitness of the object can be ascertained: at the execution of the bond the nominee may be at college, or perhaps at school, or perhaps in his cradle.

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Numberless other objections might be pointed out to this species of bond, but having already I am quite sensible, occupied too much of your Lordships' time, I will conclude by stating it to be my humble opinion, that this bond is void and illegal. The old cases, as to general bonds of resignation, were overturned by the decision of your Lordships in the case of the *Bishop of London v. Ely*, and there is not, as far as I am able to comprehend the subject, any rational distinction between the two descriptions of bonds in their operation and consequences. I conceive that special bonds of resignation are equally destitute of principle and authority. I, therefore, and bound to say that in my judgment sufficient matter appears upon the record to show that by the common law this bond is void and illegal.

GARROW B. My Lords, as the very important question to which your Lordships have been pleased to call the attention of the Judges, must necessarily occupy a considerable portion of your Lordships' valuable time, it is matter of satisfaction to me that the humble individual who has now the honour of addressing you will not consume any larger portion of it. My position in your Lordships' house is upon the present occasion favourable to me, inasmuch as I not only entirely concur in the conclusion to which my learned Brother who has last addressed your Lordships has arrived, but also in all the reasons which he has submitted to your Lordships for the opinion which he has formed. I beg to assure your Lordships, that I feel unaffectedly that if it should become necessary for me to have delivered in detail

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my reasons for the judgment which I have formed, I could not have executed it in any manner to be compared with the luminous statement which your Lordships have just heard, and I hope I may be excused from the risk of weakening the impression which the judgment just delivered cannot fail to have made upon those who have heard it. It appears to me, my Lords, that the case of *The Bishop of London v. Hytch* has settled that general resignation bonds are illegal and void; and it appears to me that bonds of the nature of that stated upon the record before your Lordships, differ only from the general bonds of resignation in degree. It appears to me, my Lords, to be essential to the best interests of the community, of which I am a member, to its religion and morals, and to the character of that useful and honourable class of men the parochial clergy, that from the moment of induction to their livings they shall be during their incumbency perfectly free and independent. To place them in any respect or degree under the controul of any person whatsoever, except their ecclesiastical head, to whom they are accountable for their conduct, would be, as it appears to me, very much to diminish their usefulness, and to introduce mischiefs only in some degree less than would be occasioned by their absolute dependance upon their patron under general bonds of resignation; to me it appears that if there were any distinction as to the person from whose influence a rector of a parish ought more than any other to be free and independent, it would be that of a patron, to whom he owed his presentation.

For these reasons with which I have already troubled your Lordships, and for those which have been so much more ably stated by my learned brother who has preceded me, I feel myself bound to answer the question propounded by your Lordships to the Judges in the affirmative, and to state my opinion that sufficient ap-
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pears upon the present record to render the bond therein stated illegal and void.

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BURROUGH J. briefly expressed his opinion that the bond was valid.

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PARK J. The question propounded by your Lordships for the consideration of the Judges, having been stated by each of my learned Brothers, who have already delivered their opinions upon this case, it is unnecessary to repeat it; I shall very shortly state to this House my reasons why I agree with two of my learned Brothers; that this question so proposed to us ought to be answered in the affirmative. It is necessary to clear the way, by considering one branch of the question first, viz. whether the matter complained of sufficiently appears upon the record to show that the bond was given in consideration of the presentation. Now upon this point I believe we are all agreed, however we may differ on others.

If this statement of the condition of the bond on the face of the record show it to be illegal; it is not necessary to show it again by express averment; but it is sufficient without any allegation in pleading. I agree that you cannot avoid this bond *under the statute*, however it may be at the common law, unless it was given in consideration of the presentation. For the statute, I humbly conceive, does not in terms make the bond void, but it renders the presentation void. The bond is only avoided as a consequence of the other. It was, therefore, necessary to see whether the bond was a consideration for the presentation, and I think, reading these pleadings, it was impossible that the Judges should be otherwise than unanimous.

In the first place it is stated, that on the *very same day*, by writing under his hand and seal bearing equal date

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date with the above written obligation Lord Sondes had presented. So that manifestly these were concurrent acts, probably both signing and sealing at the same table in the same instant of time. But it does not stop there, for the consideration of the bond states, that the said *Brice William Fletcher* has agreed to resign (speaking, therefore, in the past time, and prior to the execution of the bond, which only bore equal date with the presentation), and therefore it cannot be doubted, that the one was given in consideration of the other. Indeed, it is impossible, and common sense revolts at the supposition, that such a bond should be given which is not in consideration of a presentation; for would any man, carrying his reason with him, who has actually gotten a living in his possession, give a bond to resign it? I therefore pass from any further observation on this point.

This brings me to the great question in the case, whether this bond is void or illegal by the statute or by common law. In considering this case, I presume I am to understand myself as bound by the case of *The Bishop of London v. Fytche*, and to treat that case as the foundation of my argument; if so, I then have no difficulty in stating my humble opinion to your Lordships to be, that the courts below in this case cannot be supported.

That was the case of a *general resignation* bond; this is a case of resignation in favour of one of two individuals. Now I should be glad to ask, where, in *principle*, is the difference between the one and the other? They vary in degree but not in kind. If a bond to resign in favour of one of two individuals be good, where is the line to be drawn? Why may it not be in favour of one of three, of one of four, of one of five, of one of six, or till it becomes as general as if no name at all were mentioned, but stood simply and generally, as in *Fytche's* case, to resign upon request? If good in favour of two
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sons, or two brothers as here, there can be no limitation, whether the nominees are to be sons, brothers, cousins, friends, or mere acquaintances. In short, unless I greatly deceive myself, — and I have taken great pains to understand the case, — if evils of great magnitude were likely to flow from general bonds of resignation, I think it requires no great degree of penetration to discover, that all the mischiefs which were apprehended in the one case, if well grounded, will unavoidably result from the other. But it is said, though the case of *Fytche* must now be taken to be law, yet that proceeded against the strong opinions of *Westminster Hall*, and that decision overturned a great many former decisions, and ought not to be carried further but by legislative enactments. I agree in much of this; I am old enough in *Westminster Hall* to remember that the decision of that case created a great sensation in the profession. Probably, upon a cool and dispassionate consideration of that case, it may not stand so devoid of authority, of sound principles of policy for the interests of the church and of religion, as was supposed at that time; nor must it be taken for granted that *the policy of allowing general bonds of resignation* had never been doubted by very great Judges in our courts of common law. For besides some of those authorities, which are to be found in Mr. *Cunningham's* collection of cases on simony, and in many of which the case had not been argued, and had not been decided upon, I have lately found that Lord Chief Justice *Willes* certainly thought them bad, and he was no mean authority; for in Mr. *Durnford's* valuable edition of that learned Chief Justice's Reports, p. 575., where he is giving judgment on the validity of a bond given by the register of an archdeacon to surrender whenever the person appointing chose, his Lordship says: "This case was compared to the case of simoniacal bonds, and to be sure the comparison is a very

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just one, for it has been *holden*, that a bond given by a parson to his patron to resign generally, is void." His Lordship, it is true, excepts this case, "~~and not to a particular person.~~" But I have only troubled your Lordships with this quotation to show, that the doctrine established in *Efytche's* case was not so near as was supposed; and the case of a resignation to a particular individual was the only one excepted by Lord Chief Justice *Willes*. However this may be, I am not called on to re-argue *Efytche's* case. It is established law, and I do not agree with the conclusion come to by the bar, that that case has gone to its utmost verge, and ought not to be carried further but by statute. To that, my Lords, I do not agree. If the House were now called on to establish a new and an uncertain principle, which had never been known or acted upon before, in that case legislation alone ought to administer the remedy required for the existing evil: but where, as I have presumed to say before, the principle is precisely the same, that all the mischiefs flowing from the one inevitably flow from the other—where they vary in degree but not in kind—I think the case no more requires legislative interference than one half of the cases every day occurring in *Westminster Hall*, where the old principle is applied to new combinations of circumstances, in order to circumvent the machinations of those, who ingeniously are endeavouring by slight alterations to defeat or to evade the decisions of the Courts. Is this, then, a case within the statute of *Elizabeth*? The bond is admitted to be the condition of the presentation, and, therefore, the words of the statute being, that "if any person or persons, for any sum of money, reward, gift, profit, or BENEFIT, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, present, or collate, &c., such presentation shall be utterly void,

void, frustrate, and of none effect in law;" and, consequently, a bond, the condition of which is illegal, cannot be enforced. But it is said, this is not a *profit* or *benefit* within the statute. If it be not, I cannot well tell what it is or ever will be. This very case shows, that if Lord *Sondes* succeed, he will have an actual *pecuniary profit* or *benefit* by this presentation, and may be considered as having sold it for 12,000*l.* I am, my Lords, much at a loss myself to apprehend any case of a bond of resignation, general or special, which is not a *profit* or *benefit*. Even in the case most highly to be favoured by a parent, and perhaps the least guilty of all — a bond to resign in favour of a son, — is that not a benefit? Suppose the son twenty-one, and the father allows him 400*l.* per annum till he is of the canonical age of twenty-four, and that the living he intends for him falls vacant, and he fills it up for three years, taking a bond in 12,000*l.*, then to resign in favour of his son. If the incumbent resign, the patron puts his son into a living, perhaps of 800*l.* a year, and derives the benefit from saving his own allowance of 400*l.*; or if the incumbent will not resign, finding the living cheaply purchased for 12,000*l.* and pays the penalty; the patron gets all that money to settle on the son, and thus, in effect, he sold a void presentation; and depend upon it, my Lords, that if these special bonds, as they are called, be allowed, you will have every device put on foot by artful, designing, and acute men, in the lower departments of the law, to evade and elude the wholesome provisions of this statute, and render it a dead letter on the statute book. Indeed I verily believe, that special bonds of resignation, though known, never came into very general use till after, and were a contrivance to elude, the decision in *Fletcher's* case. It is too much to be feared, that, if encouraged, these special bonds will be given, as if intended for cases of resignation, but will be a mere

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device between a needy patron and a monied incumbent to pay a sum of money in two or three years, as the apparent penalty for not resigning, when it never was intended he should, but only in this form he should secure a *fortune*, when the law clearly would not permit a *present payment*.

In short, to my understanding, to say, that where a bond is given under a large pecuniary penalty, by which the clerk engaged to resign the benefice to the patron on a given event, is not a benefit to the patron, as well as where the resignation is to be on request, is a proposition revolting to common sense and to the common apprehension of mankind. It must then be a *benefit*; why then is it not a *benefit* within the statute? for there are no words of the limitation on the generality of the term.

Your Lordships will observe, I have not troubled you with the long string of cases to be found in *Cunningham's Law of Simony*, and which have been all brought forward and commented upon by the learned counsel at your Lordships' bar. And I have purposely abstained from doing so, because I considered myself as standing upon the last decision in *Efytche v. Bishop of London*, which had closed all discussion upon *general resignation bonds*. I have thought it more my duty to state to your Lordships my humble opinion, and the reasons for that opinion, that most of the *evils and inconveniences arising from general resignation bonds apply in kind, though perhaps not in specie, to the description of bonds mentioned in this case*. And being clearly of opinion that this case falls within the statute of *Elizabeth*, I ought perhaps here to relieve your Lordships from further hearing me, and I shall not trouble the House much longer; but I own it does seem to me that such bonds are against the general policy of the law of *England*. It is amongst the first things we learn in the law, *vide 1 Bl. Comm.*

p. 385., that a parson has, *during his life*, the freehold in himself, and of which he can only be deprived in five ways: by death; by cession in accepting another incompatible benefice; by consecration to a bishopric, unless by the favour of the crown he is allowed to hold his benefice *in commendam*; by resignation, if the ordinary will accept; and by deprivation for crime. To the same effect *Littleton*, p. 528. and *Lord Coke's Commentary*, 120 a. 341 b. 300 a. b.

The bishop cannot institute him for a less term; and yet the effect of resignation bonds, general or special, is to *convert* that office which by presentation, institution, and induction, becomes an office for life, and in which the rector has the freehold, into a term for years of longer or shorter duration, at the pleasure of the owner of the advowson, according to the object he has in view. Therefore any contract, "bond, &c." by which the incumbent undertakes to resign, being inconsistent with his actual intention, as recognized by the law, and with that life estate which as rector he has in the living, must be contrary to law. When your Lordships come to consider the oath of simony, as it is called, which every rector must take when instituted to a benefice, as prescribed by the canons of 1603, canon 40., is it fitting that a patron on one hand should have power to entrap the conscience of a poor needy clergyman, perhaps under the pressure of great poverty, or the cries of a starving family? or such a miserable man be thus tempted to violate his duty to God as his immediate servant by taking God's holy name in vain, and to call upon him to witness a falsehood? Can a man who deliberately swears, "that he has made no simoniacal payment, *contract*, or promise, directly or indirectly, by himself, or any other to his knowledge or with his consent, for or concerning the procuring and obtaining of this ecclesiastical dignity, place, preferment, office, or

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opinion, except that it was not the same as that of *Hfyche*, and, understanding it was to go to the House of Lords, gave judgment for the plaintiff.

With respect to those cases in equity, in the time of Lord Chancellor *Eldon*, in which his Lordship has been supposed to hold the validity of special bonds of resignation, I take it his Lordship meant no more than this, that there being a general notion that such bonds were good, he would not, as a single Judge, take upon him to decide upon their validity or invalidity; but he would put the question in such a shape as to obtain the judgment of this House upon it, and accordingly his Lordship sent one of the cases to the Court of King's Bench, but I believe it was compromised. This I assume to be the extent of Lord Chancellor *Eldon's* intention in the Court of Chancery, and he, who is now present, best knows whether I have drawn the right conclusion from what his Lordship has expressed. I understand the Lord Chancellor to have assented to my statement. And *here* a case now has arrived for the opinion of this House.

I beg pardon for having trespassed so long on the attention of the House, but I conclude with stating my clear opinion, that sufficient matter appears upon this record to show, that by the statute law, (and for the reasons above given I am strongly inclined to think that by the common law also,) the bond on which the action of debt was brought, and which bears equal date with the writing of presentation, is illegal and void.

GRAHAM B. The question which your Lordships have submitted to the Judges for their consideration, is: "Whether sufficient matter appears upon the record to show that, either by statute or common law, the bond, upon which the action of debt was brought in this case, and stated upon the record to bear equal date with the writing

writing of presentation therein mentioned, is void or illegal?"

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My Lords: This is a bond for the performance of an agreement, and a breach assigned under the 8th and 9th of *W. & M. c. 11. s. 8.* which says that, "in all actions for non-performance of any covenants or agreements in any indenture deed or writing contained, the Plaintiff shall assign as many breaches as he shall think fit, and the jury shall assess," &c.: the Defendant in error has proceeded under this act. Here the breach assigned is of the condition of the bond, and, therefore, the condition is the expression of the agreement of the parties. Your Lordships, therefore, must look to the forms of the agreement as expressed in the condition of the bond, and must put a construction upon it. Looking at the recitals expressive of the transaction, and the occasion of it, I think that it appears by the plain and natural construction of them, that the presentation was acquired solely on the terms of giving this bond; that is, that the bond was the consideration, or the price paid for the presentation; why else are both these instruments of the same date, probably executed on the same day or meeting, the presentation being first executed in the order and course of the transaction, as before the parson presented gives a bond to resign, he must have something to resign? It seems to me impossible to consider the presentation as a separate act, independent and unconnected with the bond. Suppose that after Lord *Sondes* had executed the presentation, Mr. *Fletcher* had refused to execute the bond, would not Lord *Sondes* have refused to give validity to the presentation? and he had a power to revoke it; 2 *Roll. Abr.* 349.: "If a man presents his clerk to the bishop, he may present another before the bishop has received his clerk;" *à fortiori*, Lord *Sondes* might have cancelled his seal before he sent the presentation to the bishop, if we take the

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necessary sense of the language, "whereas Lord Sodes has presented," and "whereas Fletcher has agreed to resign:" what is that but to say, that as Lord Sodes has presented, Fletcher has agreed? The inducement of Lord Sodes to present is the agreement of Fletcher to resign. In other words, the consideration of the presentation was the agreement to resign, as without it, by the terms of the agreement, the presentation would not have been made, nor *vice versa*. If this be the clear sense of the agreement, the question is, whether this bond is within the 31 *Eliz. c. 4.*, that is, whether it is directly, or indirectly a benefit within the true meaning of that statute.

Whether a benefit or not, is best discovered by the use that is made of the bond. This view places the Defendant in error in a singular position. His arguments at your Lordships' bar are urged to show that such a bond is not a benefit to the patron within the true and approved meaning of that statute, but the use which he has made of the bond, and the record which is now before your Lordships, prove that it is a benefit to the extent of 10,000*l.* If it be said that this was not a benefit contemplated at the time, but was unexpected and remote, and the effect of the breach of good faith, I answer, it was the object of the bond to secure a presentation, or to secure a compensation in case of disappointment. The bond secures a power to create a vacancy, or an equivalent for withholding that power; the equivalent is, therefore, the exact measure of the value of that power, and that in this instance is ascertained to be 10,000*l.*

It is said with a weight of authority which I feel, that these bonds by contemporaneous decisions long followed, have never been considered as benefits within the statute, but that weight is much lightened by the discussions which took place in the *Bishop of London v. Rfytche*. That case has authorized us to look to this without

without the prejudices of past opinions, however high in estimation, or even past decisions; and I may be allowed to say, that not one of those decisions underwent that full discussion of the effect of those bonds which it received in the case to which I allude, or received that illustration which has been thrown upon the subject by the arguments at your Lordships' bar, and the state of the record in this case. I therefore, my Lords, humbly state it as my opinion, that by the terms of this condition it does appear that this bond was given as the consideration of the presentation, and that it is a substantial benefit, and so within the statute of *Elix.*

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It is said that this is not corrupt. Though there may be no moral turpitude in taking an equivalent for a thing given, yet it may be called a corrupt contract; in this case a right of presentation is given which the law forbids; a presentation which the law does not allow, and therefore corrupt.

But, my Lords, I humbly think that bonds of resignation general, or in favour of a son or other person, are void on the fundamental principles of the common law. A parson has a freehold at law, *Co. Lit.* 341 a. "In whom the fee simple of the glebe is?" is a question in our books. Some hold that it is in the patron; but that cannot be, for two reasons, &c.; some that the fee simple is in the patron and ordinary; but this cannot be, for the causes aforesaid; and, therefore, of necessity, the fee simple is in abeyance, as *Littleton* saith. Upon consideration of all our books, I observed this diversity, that a parson or vicar, for the benefit of the church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to do any thing to the prejudice of his successor, in many cases the law adjudgeth him to have in effect *but an estate for life*: *causæ ecclesiæ publicis causis æquiparantur, sed summa ratio est quæ pro religione facit: sed ecclesia fungitur vice minoris; meliorem*

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orem facere potest conditionem suam, deteriore nequam."

I will not say more on this head: your Lordships are aware of the able manner in which that was urged, as the ground of the opinion of a noble Lord, in the case so frequently alluded to; I therefore humbly offer my opinion, that this question ought to be answered in the affirmative.

ALEXANDER C. B. The question is, whether sufficient matter appears upon the record to show that the bond on which the action is brought is void or illegal, either by the common law or statutes? I am one of those who are of opinion, that enough appears upon the record to show that the bond is void and illegal.

It is not my purpose to enter at great length into this argument. I should be in danger of occupying the important time of your Lordships by a mere repetition of what has been already very clearly and strongly urged. I shall confine myself to a brief exposition of the course of reasoning which has led me to the conclusion I have stated.

I am of opinion, that the condition of the bond, which condition is narrated upon this record, sufficiently shows the nature of this transaction. It shows that the transaction was a stipulation for the bond on one side and the presentation on the other. The bond would not have been given without the presentation, nor the presentation without the bond; the whole is one contract, of which these are the corresponding points. This is, I think, manifest upon the face of the instrument itself. The instrument is upon the record, and we are, therefore, able to reach the merits of the question.

Next, I am of opinion, that the decision in this House, in *The Bishop of London v. Eytche*, would, if I were otherwise disinclined to it, compel me to answer to

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your Lordships' question, that this bond is void and illegal by statute; this conclusion follows necessarily from that resolution. It is, as it seems to me, a strict consequence of it. I cannot distinguish, upon any tangible principle, between a general and a special resignation bond. All objections of all descriptions which exist fatal to the one affect the other. Somewhat softened and alleviated, it is true, by the patron's supposed object; softened, not eradicated, they exist still exactly of the same nature and character. These are the general grounds of my opinions; I proceed to explain them somewhat more in detail, yet still, I trust, briefly. Upon the first point, that is, whether the contract which taints this instrument is sufficiently apparent upon the record, I feel it to be the less requisite to detain your Lordships, because the Judges appear to be nearly agreed upon it. I shall only say that legal sense is very remote from the common sense of mankind, if the mutual contract is not manifest upon the face of the document, and the condition of the bond recited in the record. It there appears that the presentation and the bond bear equal date. It is there stated, that the patron *had* made the presentation, and the clerk *had* agreed to resign upon request. Would it not, in the common affairs of the world, be an insult to the understanding, equally of the lettered and the unlettered, to tell them that these contemporary acts and obligations, recited in the same instrument, bearing date on the same day, having from their nature, reference and relation to each other, were not the corresponding parts of one contract, but distinct and independent acts?

I would remind your Lordships of the words of Lord *Mansfield*, in the case of *The Bishop of London*, upon this point, if it had not been done yesterday by my Brother, Mr. Justice *Park*. It is sufficient if the contract appears upon the bond. If it had not appeared it might

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might have been necessary to plead it. But in all the discussions at which I have been present, upon this point, no reason has been stated, nor valid authority cited to prove that that must be had by averment which is manifest without it.

I shall now proceed to explain why I think the order made by your Lordships' House in *The Bishop of London v. Efytche*, decides the present question.

In the first place, I do not presume to examine that order further than is necessary to ascertain what it is, what must be inferred from it, what are the principles on which it is founded, and what rule of decision it lays down for future Judges. To that extent I must examine it, because without such examination I cannot apply it. But I ought to go no further. It is not for me to enquire whether that resolution departed from the course of decision which had before prevailed in *Westminster Hall*, nor whether it is supported by those great principles of civil and ecclesiastical policy interwoven with the constitution of the State, as essential to its prosperity.

These were topics properly brought into action when that case was under consideration. Here, in my humble judgment, they are at least unnecessary. That cause is decided, and I am bound by it. There I must look for the law upon this subject. To what source are we to look for what is called the unwritten law of the land, if not to the decisions of the supreme judicature; and upon what principle are you to expect that your decisions shall bind your posterity in the times that are to come, if you yourselves are not bound by what your predecessors have done in the times that are past? I take, therefore, the rules that necessarily flow from that decision to be fixed and settled. My Lords, it follows from that decision that a *general* bond of resignation is void and illegal — I say, *general*. The issue in that case, it is
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true, was not upon the validity of the bond, but it involved that question.

The issue was upon the presentation. If the presentation was illegal because of its connection with the bond, the bond must have been illegal because of its connection with the presentation.

If a contract be void, either as prohibited by positive enactment, or as contravening the policy of the law, the engagements on both sides must be equally invalid. If the whole contract is void, every part must be so. I refer to the case cited by my Brother *Hullock*; yet I will take the liberty of adding one *dictum*, on account of the great names from whence it comes — the Earl of *Mansfield* and Bishop *Stillingfleet*. Lord *Mansfield*, in the case of *The Bishop of London v. Ffytche*, is reported to have expressed himself as follows: “The next objection stated was, that the bond was good, but the presentation void. That is very extraordinary; and Bishop *Stillingfleet* treats it as a most absurd proposition, that it was a good agreement in respect of the bond, and bad in respect of the presentation; and that that which was corrupt in itself could be good in a bond, and bad in a presentation.” The opinion expressed in these words appears to me to be so clear, that I feel entire confidence that no scepticism can doubt it, and no subtlety confuse it.

I assume, therefore, that a decision against the validity of the presentation in the great cause so often alluded to, was in effect a decision against the bond of resignation which had been there given, or, in other words, against a general bond of resignation.

The case which is my guide having settled that a general bond of resignation is invalid, it remains for me to consider whether, upon the same principles, I am to adopt the same conclusion as to a special bond with the provisions contained in that now in question.

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The two points which appear to me to have conducted the House to the reversal of the judgment below in that cause are, first, that the bond was a benefit to the patron within the statute of *Elizabeth*; and,

Secondly, that it was in effect an abridgment of that estate for life in the benefice which the law deemed essential to the independence of the incumbent, to the due administration of the duties of his sacred office, and which was therefore conferred upon him by the admission, institution, and induction, and which for the same reasons it would not permit to be abridged by any contrivance whatever. What it was agreed should not be done directly, it would *not* permit to be done indirectly.

That these were the chief points in debate in that cause, so far as related to its substance and its merits, I collect partly from the questions put by the House to the Judges, and partly from the opinions reported to have been delivered by such of the members of this House as concurred in the order of reversal ultimately pronounced.

The question is, whether either or both of these objections may not be equally stated against this bond. It appears to me that both may. I think that if a general bond be a benefit to the patron, this is so also. A general bond is an obligation to resign upon request made. It is general, because there is no previous condition necessary to enforce the resignation other than the request. This bond is also an obligation to resign upon request. That is the contract; but there is annexed to it a condition that the request shall not be made until a person named be capable of accepting a benefice. Is that condition, wholly destructive of the benefit?

The benefit may be less in degree because many circumstances must concur instead of one, but that does not alter the nature and character of the stipulation.

It was argued in *The Bishop of London v. Ffytche*, that these bonds, if they were legal, afforded an easy mode of selling the presentation after the vacancy.

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The argument was this, — let the clerk give the resignation bond. When the request is made, let him refuse, let the action be brought, and let the patron recover. There is a sale of the presentation authorized by the law.

Is not this quite as open to the same contrivance? The obligation is precisely on the same terms, with this addition only, that some person named, you cannot confine it to a son or relation, it may be any body, shall be capable of accepting the benefice. How easy to insert a convenient name! The person named becomes capable. The request is made, as was intended, it is refused, the action is brought, the money paid, and the living is legally sold.

Is it not obvious, my Lords, that if the argument I have referred to had any weight against general bonds, it ought also to weigh against a special bond.

I have stated that in this bond the stipulation is the same as in a general bond. The contract of the clerk is to resign upon request. The nominee is introduced only to explain why the patron has exacted the bond, and to affirm that his object in requiring the resignation will be to present the nominee.

But when he has obtained the resignation, who can undertake that he will present the nominee, or that the nominee will accept? The capacity to accept is the whole condition. Nothing more is required to authorize the request, and with the request to entitle the Plaintiff to recover.

It appears to me obvious that these circumstances do not alter the nature and character of the benefit derived from the bond, but only diminish the amount of the value by converting that which in the general bond is a

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certain advantage into a contingent advantage. A man may dispute how far, in what degree the contingency diminishes the benefit, but no man can say that it destroys it.

No such bond as this can be given without putting it upon the cards (if I may be allowed such an expression on such a subject) that the patron *may* derive great benefit from it.

In this case, for instance, sustain this bond, affirm this judgment, you decide that this bond is no benefit to the patron, and you prove it by transferring by force of the bond a large sum of money into his pocket.

It were easy for me, my Lords, to multiply hypothetical cases in which the patron might derive advantage from such an obligation on the part of the clerk.

I shall not, however, pursue it, having, as I humbly conceive, said enough to explain the course of reasoning which induces me to think, that if a general bond of resignation be a benefit to the patron within the statute, this also must be a benefit to him, not perhaps so highly valuable, but still a benefit, and exactly of the same character and description.

The other great objection urged against general resignation bonds is, if possible, more manifestly applicable to special bonds, than that which I have just mentioned. It is, that they affect the degree of interest which the wisdom and policy of the law give to a clerk in his benefice. That is an estate for life.

In the argument of *The Bishop of London v. Mytchell*, it is thus put. The whole estate and interest of the clerk is derived from the bishop; no part of it from the patron. He has a bare power of nomination.

The law gives him no authority to diminish or vary the estate or interest conferred. To do so indirectly is in truth a fraud upon the law, adverse to its spirit, and destructive of its views. So it was argued by these

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Lords whose opinions prevailed in that cause. Does not this bond also quite as evidently vary and diminish the estate conferred by institution and induction? Can any distinction be suggested in this respect between general and special bonds?

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I venture confidently to answer none. The incumbent's estate is liable to be determined on the person becoming capable of accepting a benefice. So that that is a limitation upon an estate for life. When the first condition has happened, as in this case, the bond becomes void, and the estate of the incumbent hangs upon the request.

If that circumstance, therefore, is fatal to general bonds, it must be equally so to the bonds referred to in the question put to the Judges.

The feeling to which the opinions I have stated are adverse, arises from the effect which these opinions have in diminishing the value of advowsons, and in somewhat embarrassing patrons in the object of providing by means of church preferment for their friends or relations.

Upon this I shall say only, it certainly has that effect. But, in my humble judgment, that circumstance ought not to affect my opinion on the question put by your Lordships. It would be more material in a question of what the law ought to be, than in a question of what it is. Even there, there are weighty considerations on the other side, but here the topic is misplaced.

The answer, therefore, that I give to the question put, is, that I think the case decided by your Lordships overrules this question, and that I must answer, that this bond is illegal and void.

BEST C. J. My Lords, I thank your Lordships for allowing me to sit whilst I state my opinion on the questions submitted by this House to the judges, and the grounds on which I have formed that opinion. The question is, "Whether sufficient matter appears upon

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the record to show, that, either by statute or common law, the bond upon which the action of debt was brought in this case, and stated upon the record to bear equal date with the writing of presentation therein mentioned, is void or illegal." I will not detain the House by any technical observations on the point, whether the supposed objection to the bond be raised by the pleadings in this cause, because I humbly submit to your Lordships, that if it had been expressly stated on the record that the Plaintiff in error was presented to the living of *Kettering*, on the condition of his giving a bond to resign to the intent and for the sole and only purpose (in the language of the bond) that the Defendant in error might be enabled to present one of his younger brothers, when such brother should be capable of being inducted into such living, the bond would not have been void either by the statute or common law. But for the judgment of this House, in the case of *The Bishop of London v. Efyitch*, I will venture to say there never was a lawyer, from the time when tithes were first granted to the church to the present, that would not, without hesitation, have given the same answer. It is now, however, thought by some of my learned Brothers, that resignation bonds in favour of particular persons, although sanctioned by judges, bishops, and chancellors, are void; that the condition of resigning benefices is repugnant to the estate which incumbents have in them, and that therefore bonds containing such a condition are void by the common law; that such bonds are benefits to the patron, and subject the givers and takers of them to all the penalties of the statute for the prevention of simony; that they cause the ministers of the gospel to take false oaths, and are therefore not to be endured in a Christian community. My Lords, although I most sensibly feel the weight of the authority to which my humble opinion is opposed, yet, supported by two of my learned Brothers, I am vain enough to think we shall satisfy your Lordships,

ships, that such bonds are liable to none of these objections. The judgment in *The Bishop of London v. Efytch* has not decided, nor did the House intend in that case to decide this question; but it has been insisted in argument, that the principle which that case establishes governs this. My first duty will be to show that that case establishes no principle that by fair and legal reasoning can be applied to the present. I have not, therefore, to express the hope that Lord *Kenyon* expressed in *4 Term Reports* 81., that your Lordships will review that decision. I have only to request that the principle on which that judgment rests may not be extended further than those who pronounced it intended it ever should be, and that it may not be applied to cases which cannot be productive of the evils which it was their object to remedy. Thus much I might ask, although disposed to admit what has always appeared to me repugnant to reason and authority, namely, that a supreme court of justice cannot undo what it has erroneously done. Although the Courts below will not impugn your Lordships' judgments in cases *ad idem*, yet they do not hold that they are bound by them beyond the point actually decided. The Courts below truly say, we cannot know that the House of Lords would carry this determination farther than they have carried it. In the case of *Partridge v. Whiston*, *4 Term Reports* 360., the Court of King's Bench said, "That a bond to resign in favour of the son of the patron did not raise a point precisely like that in *The Bishop of London v. Efytch*, and they were bound by the established series of precedents to give judgment for the Plaintiff." This decision, although pronounced on a point appearing on the record, and therefore liable to be disputed in this House, was never disturbed.

My Lords, in *The Bishop of London v. Efytch*, the point decided was, that a presentation was void, which was made in consideration of a bond given by the

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presentee to the patron, by which the former bound himself to the latter, absolutely to resign the living on request made to him by the patron to make such resignation. The question in this case refers to a bond given by the presentee to the patron to perform an agreement made between them, that the former would resign the living to the latter, to the intent and for the sole and only purpose that the latter might present one of his brothers when such brother shall be capable of taking an ecclesiastical benefice. The question in the case referred to regarded one particular description of bonds, and, in the present case, regards bonds of a very different kind,

If you reason from generals to particulars, the course is easy and safe; but if you rise from particulars to generals, or draw inferences from one particular to another, you must be careful that the particulars in every material respect resemble each other, or your reasoning will be illogical, and the analogy will fail. This is strictly true in every science, and the Bishop of *Llandeff*, who was eminently learned in many sciences, says, in *The Bishop of London v. Fitch*, "A slight variation in circumstances vitiates the validity of a precedent, and the ground on which it vitiates it is, that we cannot tell whether this variation of circumstances, had it been contemplated by the Court which first established the precedent, might not have operated so as to produce a different judgment." We are all sensible that when the mind is suspended, as it were in equilibrium, by the equal prevalence of opposite reasoning, in cases of intricacy, what a little circumstance would cause it to preponderate, and this little circumstance by which any case differs from an adjudged case, lessens, if it does not annihilate, the weight of a precedent. I will presently show that special bonds in favour of particular persons cannot be used for the same corrupt purposes as general bonds, and that they differ from them more in substance

stance than they do in form. The House, in *The Bishop of London v. Fytch*, did not go beyond the question raised by the pleadings in the cause. The question put to the judges is not whether all resignation bonds are void, but whether certain specified bonds are void; the language of the question is, Whether an agreement, whereby the incumbent undertakes to avoid the benefice at the request of such patron, be not an agreement for a benefit to such patron? The answer of the learned Judge, who was of opinion that the bonds spoken of in the question were illegal, is confined to general bonds, to resign on request. He says, "In this case the patron was presented by reason of an agreement, that the clerk should give him a general bond of resignation, which being a profit and benefit within the statute, his presentation is void: That is the general question on the plea. Again he says, "the form of these bonds facilitates to a great degree that buying and selling of benefices, which, Bishop Gibson says, they were introduced for the purpose of effecting: the legal history of those bonds shows how generally they have been used for that purpose." Whether Lord Chief Justice Eyre's reasoning, that because the form of these bonds was calculated to facilitate the buying and selling livings, therefore (without proof that the bond in question was intended to be used for such purpose), all such bonds are to be holden to be simoniacal, be just, or not, it cannot apply to the bond in the present case: such reasoning cannot apply to bonds, the history of which does not show that they have been used to facilitate the sale of livings, and which can only be used for such a purpose in one case, namely, where the presentation is sold to a person incapable of being presented whilst the church is void, and a bond is taken from the clerk presented, to resign when the purchaser shall be in full orders. Cases of this sort can scarcely ever occur; they must be so rare

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that it is impossible to make them the grounds of a general condemnation of such bonds. It is enough that the bond may be avoided when such a corrupt use of it is proved. The reverend prelates who favoured the House with their opinions in the case of *The Bishop of London v. Efyth*, although they expressed doubts of the legality of bonds in any form or under any circumstances, confined their judgments to general bonds, and all their reasoning went to prove the impolicy of general bonds only. The Bishop of *Bangor* says, "I am inclined to think that bonds of resignation, whether the condition be special or general, are within the express letter of the statute of *Elizabeth*, because it is impossible to conceive how a presentee can in any instance give a bond of resignation to a patron, from which the patron will not derive some benefit or reward directly or indirectly." This is but the inclination of opinion, not decided judgment. I would beg to observe, that if the principle of some benefit, direct or indirect, be adopted, (a principle altogether inconsistent with the legal construction of penal statutes) many most conscientious patrons, as well ecclesiastical as lay, have committed the detestable crime of simony. The Bishop of *Bangor* says, "If a bond of any sort can be said to be without exception." Except these expressions of dislike of any bonds of resignations, all the observations of the reverend prelates are directed against general, and general bonds only. The Bishop of *Salisbury* says, "General bonds of resignation have usually been given, and from the instant they are given, the wretched presentee is taken from under the protection of that law which guards every other subject of the state. He ceases to be free, because he holds his living at the absolute will of his patron, subject to his caprice." The Bishop of *Bangor* speaks always of general bonds. "Suppose," says his Lordship, "that a patron presents a clerk to a benefice without

without receiving any money, bond, or assurance for money, but the clerk enters into a bond to resign on six months' notice: as soon as he is in possession, the patron demands a lease of certain tithes at an under rent." His Lordship sums up his argument by saying, "the worst and most corrupt practices may be carried on under general bonds of resignation." The Bishop of *Llandaff* speaks of general bonds only. The Bishop of *Gloucester* says, "A bond which conceals the consideration for which it was given, and which may easily be abused to the most oppressive and iniquitous purposes, affords a strong suspicion of a bad design. If the consideration were a good one, why is it not expressed as in special bonds it always is, in plain words?" Although these learned prelates, from a proper regard for the independence of the clergy, and a jealousy of what they thought interfered with the authority of their order, disliked all resignation bonds, yet it is clear, that they only decidedly condemned general bonds. The Bishop of *Gloucester* distinctly admits not only the legality, but the propriety, of some special bonds of resignation.

The reasoning of Lord *Thurlow* goes only to impugn general bonds. "Nobody," he says, "contends that the practice is not wicked, destructive, and pernicious to the discipline of the church, and contrary to the spirit of the law under which it was carried on: he could produce evidence of an offer to sell an advowson, upon which the purchase-money was calculated and put on a general bond of resignation (no such arrangement could be made on a special bond); and he knew that instances of it were frequent" (*Cunningham*, 156.). Your Lordships are aware that Lord *Thurlow* had recently changed his opinion. When *The Bishop of London v. Hyslop* came before him in the Court of Chancery, that learned Lord said, "If there were no cases, I should think it clear,

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clear, that a mere bond for resignation could not be criminal, unless it were a profit or benefit to the patron." Many cases have determined that these bonds were good; the effect of the determination is, that they are not simoniacal, nor against the policy of the law. *I Brown, 96.* His Lordship's argument in the House of Lords, so far from proving that bonds to resign in favour of a son or a brother (which no reasonable man could say are wicked and pernicious to the discipline of the church, and could be made use of to enable sales of benefices) are illegal, shows that general bonds of resignation, although under circumstances voidable in Chancery, are not void at common law. He says, "The bond is not capable of being avoided but by averments of bad consideration and use; if you cannot aver upon it in that manner, whatever the common law may do with it, by the common law it cannot be rescinded." (*Cunningham, 138.*) His Lordship then compares them to marriage, brokage bonds, and says, "Abundant cases may be put, to show that it is impossible to avoid those bonds at law;" and refers to the case of *Hall v. Potter (a)*, decided in this House, in confirmation of his opinion. If I understand this argument, it is not that every general bond is void at law, but that it may be avoided if a bad use be made of it. Lord Mansfield says, "The case stands singly on this proposition, whether an agreement by a general bond of resignation, in consideration of a presentation, was, by Stat of Elizabeth, simoniacal, corrupt, and void."

I hope I have clearly shown; from the pleadings, the questions put to the Judges, and the opinions of the Judges and Members of this House, that the question now submitted to us by your Lordships is not touched by the judgment in *The Bishop of London v. Fletcher*. It has been stated, that special bonds differ only in form from general bonds; that the condition to resign may be in favour of

(a) *Cunn. 25.*

such

such as are neither the children nor relations of the patron; that if the names of two persons may be introduced into such bonds, the names of any greater number of persons may be inserted. Put into a special bond as many names as you please, you can no more make it in form or substance like a general bond than by adding equal numbers to an unequal number you can make the total equal. You cannot, by a special bond, reduce the incumbent to the same state of dependence on the caprices of the patron as by a general bond; you cannot render it available to accomplish the sale of a benefice, as you can a general bond. If a living be vacant, it cannot be sold; but if general bonds were permitted, the patron might present to the vacant benefice. Take a general bond of resignation from the presentee, and when he has got his price for the benefice call on the incumbent to resign; and thus, as Lord *Thurlow* says, "he may calculate the purchase-money on a general bond of resignation." The patron cannot make this calculation on a special bond, even if he be not obliged to present, on the resignation of the incumbent, the person mentioned in the bond, and on whose behalf the resignation is called for. If a special bond can be made use of to evade the penalties of the statute of *Elizabeth*, the taking it for such a purpose, if properly pleaded and proved, would render it void; and the insertion of an unusual number of names, and those persons not connected with the patron, would be evidence of such an intent.

I am not prepared to say that the persons in whose favour resignations are required must be relations of the patron. He may honestly think, that a person who, from temporary infirmity or absence, or from his not yet being in orders, is incapable of being presented to the living, will, when the disability shall be removed, be the fittest person to fill the church. But I think

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Lords, that a patron may be compelled to present the person, for the purpose of presenting whom he calls on the incumbent to resign, and that he may thus be prevented from making an improper use of the power given him by the bond. As my Brother *Gaselee* has said, the Bishop may refuse to accept the resignation, until he has in his hands the presentation of him in whose favour the resignation is required; or the incumbent may make a conditional resignation. Such conditional resignations have been made where livings have been exchanged. Sir *Simon Degge* gives us the form of such a resignation, in which the bishop is expressly required not to admit the other clerk, unless the exchange be completed, but to consider that resignation as of no effect. This agrees with the common law. Lord *Coke* says, "If two exchange lands, and one die before the exchange is executed, it is void." There are several instances in which courts of equity have interfered to prevent the making an ill use of these bonds. No case is to be found of an action at law; but as the loss of a benefice is the loss of a temporal advantage, otherwise the Court of Chancery could not have interfered, I should think that there could be no doubt, that if a patron called on an incumbent to resign his benefice to the intent, and for the sole and only purpose, that he might present *A. B.*, in favour of whom the patron had a right to call on the incumbent to resign, and after having obtained the resignation by such false pretence, he presented *C. D.*, for whom the bond did not authorize the patron to require a resignation, compensation for the injury the incumbent had sustained might be recovered in an action. If such an action be not maintainable, a man may, through fraud, sustain a temporal injury, and yet have no redress; which, I apprehend, would be inconsistent with the first principles of our law.

Although

Although the validity of general bonds was supported in a great number of decided cases, there were some in which it was doubted, and others in which they were declared to be illegal.

Lord Keeper *North* said he was not satisfied that such bonds were good in law. In the case of *Graham v. Graham* such bonds were holden to be within the statute of *Elizabeth*, by the Court of Common Pleas, in the 15th of *James* the First. Where authorities clash, a court of error, at the same time that it confirms some judgments, must overrule such as are contrary to them; but where there is a long series of decisions, no authority can be opposed to them. I think a court of law cannot overturn them.

The legality of special bonds is supported by decisions both of common law courts and courts of equity, from the time of *Henry* the Fourth to the present. In *Jones v. Lawrence* it was recited on the bond, that it was the intention of the obligee to preserve the presentation for his son, when he should be capable of taking the living. The obligor bound himself to resign within three months after request. The King's Bench first, and afterwards the Court of Exchequer Chamber, held, that a bond to resign, on request, if the patron will present his son thereto when he should be capable of taking the living, is good. This is the decision of all the Judges of *England* in the eighth of *James* the First. Lord *Coke* was then Chief Justice of the King's Bench; and in his reading in the statute of *Elizabeth*, he says, that he was in parliament when that act passed; that he voted with the proceedings of the House; and he concurred with the other Judges that such a bond was valid. Can your Lordships have so safe a guide to lead you to the true meaning of a statute, as one of the most eminent lawyers that ever lived, who took a part in the making the law, knew the
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evil that parliament meant to correct, and the exact extent to which it was intended the remedy should be carried? In *Hillar v. Stapleton, Michaelmas, 1707*, the Lord Keeper said, "Resignation bonds have been allowed, since the statute, only to preserve the living for the patron himself, or for a child, or to restrain the incumbent from non-residence, or a vicious course of life. If the bond be general, his Lordship observes, a particular agreement must be proved to resign for the benefit of a friend that would be presented; and without such agreement the bond ought not to be sued on."

In *Peele v. Capel, Str. 534.*, the bond was to resign when the patron's nephew came of age. Instead of the patron's requiring a resignation, an agreement was made that *Peele* should hold the living, paying the nephew 30*l.* a year. This payment was made for several years, but was afterwards refused, and the bond put in force. The Chancellor granted an injunction, but said it was not on account of any defect in the bond, which he held good, but on account of the use that had been made of it.

In an anonymous case in 15*W.3.*, *Powell J.* concurred with *Blenbow*, the only other Judge in court, in supporting a general bond, because, he says, it may be to an honest intent, as that the patron may have a son of his own capable of taking the benefice; but, says he, if this was the real motive, why should it not be expressed in the condition? This very learned Judge entertained no doubt of the legality of special bonds, or of the justice or policy of allowing them. In *Partridge v. Whiston*, the Court of King's Bench said they were bound by an established series of precedents to give judgment for the Plaintiff in an action on a bond on a condition to resign in favour of a son of the patron. This case might have been carried to the House of Lords, for the question was raised on the record, but

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the judgment was never disputed. To these decisions no judgment of any court, no dictum of any judge, can be opposed. The over-riding of so many authorities, by any power but that of the legislature, will destroy entirely the certainty of the law; no man can know what are his rights or duties.

We talk much of national faith; I hope, my Lords, it will ever be kept inviolable. National faith is not, however, confined to any particular compacts; it requires the strict observance of all laws under the sanction of which any of the subjects of this empire have acquired any rights. The contrary of these decisions would be a breach of national faith to those who have been ordered by them to purchase advowsons. Immense sums of money have been expended in buying advowsons and presentations, from the highest assurance next to that of an express declaration by the legislature, that in case of livings becoming vacant before those on whom the purchasers intended to bestow them are capable of taking orders, they might present to such livings, and take the security of a bond from the presentees for the resignation of them when the person for whom they are intended shall be in priest's orders. Many of these purchasers have no other provision for their children, but the living so purchased. Ecclesiastics as well as laymen have dealt in these bonds of resignation. Lord *Mansfield* says, a Bishop of *Salisbury*, before his (Lord *Mansfield's*) time, frequently took them. This is not said of that right reverend prelate by way of reproach, but to show that men of the highest character did not consider that the taking such bonds was improper.

Your Lordships will permit me to remind you that if you decide that these bonds are within the statute of *Elizabeth*, you make those who have given, and those who have taken them, criminals. Both the Plaintiff and Defendant in error, and many other persons, as well as clergymen, as laymen, have, whilst acting under the sanction

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of the Courts of *Westminster*, committed the scandalous crime of simony, and subjected themselves to all the penalties of the statute of *Eliz.* I am aware, my Lords, that this argument was answered in *The Bishop of London v. Efyuch*, by saying that these consequences of the judgment could be prevented by an act of parliament; your Lordships cannot have forgotten the answer of Lord *Mansfield*. to this observation: "What! pass a judgment to do mischief, and then bring in a bill to cure it!" I will add, will you condemn men by a judgment that has all the vice of an *ex post facto* law, and after confiscating their property, save them from further punishment by a statute pardon? But let us forget for a moment that there are any decisions on the subject. The statute of *Eliz.* cannot be holden to embrace this case without setting aside rules that since the revolution have been uniformly observed by all Judges, and which tempers with mercy the justice of our criminal law. The statute of *Eliz.* is a penal law. The rule to which I allude requires that all penal laws should be construed strictly, that no case should be holden to be reached by them but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws. If general words follow an enumeration of particular cases, such general words are by another rule of construction holden to apply only to cases of the same kind as those which are expressly mentioned. By the 14 G. 2. c. 1. persons who should steal sheep or any other cattle were deprived of the benefit of clergy. The stealing of any cattle, whether commonable or not commonable, seems to be embraced by these general words, any other cattle; but by the 15 G. 2. c. 34. the legislature declared that it was doubtful to what sorts of cattle the former act extended besides sheep, and enacted and declared that

that the act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf and lamb, as well as sheep, and to no other cattle whatsoever. Until the legislature distinctly specified what cattle were meant to be included, the Judges felt that they could not apply the statute to any other cattle but sheep. The legislature by the last act says it was not to be extended to horses, pigs, or goats, although all these are cattle. Lord Chief Baron *Comyn* says: "A penal statute shall not be extended by equity, and the general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted."

By the 31 *Eliz. c. 6. s. 4.* for the avoiding simony and corruption in presentations, collations, and donations of and to any benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same, if any person or persons shall for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice, with cure of souls, dignity, preferment, or living ecclesiastical, the presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction, shall be utterly void, frustrate, and of none effect in law, and the person giving or taking the money, &c. shall forfeit double the value of one year's profit of the benefice, and the person accepting the benefice shall be for ever disabled from holding the same. The only words in this statute that can be so far stretched as to reach the bond which is the subject of the present action, are profit or benefit; but these, according to the restrictive rules of construing penal statutes, mean only profits or benefits *ejusdem generis* with money, rewards, or gifts, such as bills of exchange,

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instead of money, leases of the tithes or profits of the benefice, or loans of money or other valuables for a long or indefinite period of time, instead of immediate gifts of the same things. If this construction be not put on the words, no patron, either lay or ecclesiastical, can present or collate a son that is dependent on such patron to any preferment in the church, without being guilty of simony. If a bond for the resignation of a living in favour of a son be a benefit, the presentation of a son to a vacant benefice must be a benefit, for the first is only a means of obtaining the second. Indeed, there can be no doubt that if a patron has a son whom he maintains, it is generally a benefit for him to have a living to which he can present such son, for few persons would allow a son as much after he was in possession of a benefice as he received before. But this was not that corrupt benefit which was contemplated by the legislature when this statute was passed. Whatever expressions are to be found in the act, the object of the legislature was only to prevent simony, and such advantages as these were never thought to be simoniacal. Lord Chief Justice *De Grey* says, in *2 Bl. Rep. 1062*, the statute has not adopted all the wild notions of the canon with regard to simony; but the giving or granting this bond would not amount to simony even by the common law. The words that approach nearest to it are those of the canon of 1229: *Nalli liceat ecclesiam nomine dotalitatis ad aliquem transferre*: all the other canons are confined to the trafficking in presentations, and preventing the granting of leases and pensions by incumbents. One definition of simony by a canonist is, *studiosa voluntas emendi vel vendendi aliquod spirituale vel spirituali annexum*. This definition can by no construction be extended to special bonds of resignation made to enable a patron to provide for his relation or friend. Another writer has defined simony to be *spiritualium*

ritualium acceptio vel donatio non gratuita. These words *non gratuita* are used as the opposite of *gratuita*, and only apply to a corrupt bargain for money, or other direct property. In exchanges, each party proposes to himself some benefit; the one expects to get more profit, the other a more healthy, or agreeable, or advantageous residence. Yet exchanges are expressly allowed by the statute of *Elizabeth*, because exchanges, though productive of temporal advantages to one or both parties, are not the vile corrupt contracts which were intended to be prohibited by the legislature. But it has been said by one of my learned brothers this is a benefit and profit, because, by means of it, money will be obtained, for if the judgments of the courts below should be confirmed, the Defendant in error will get 10,000*l.* The performance of the condition of all bonds is enforced by pecuniary penalties, and which pecuniary penalties may in the event of a breach of the condition be recovered. This is the case when bonds are given for the faithful performance of any office. Yet such bonds have been enforced over and over again, and no such objection was ever made to them. If the intent of the obligee was to obtain the penalty of the bond, and not the resignation of the living, such intent would be corrupt, and the bond made to carry it into execution would be void. That would not be a resignation bond, but a money bond; all that was said about resignation being a mere colour to cover the corrupt intent. But this corrupt intent not appearing on the face of the bond must be pleaded. There is no such plea in the present case, nor is there the least reason to suspect that the Defendant in error ever contemplated so mercenary and so base an object. He expected that the obligor would perform the condition of the bond, and then no money or other corrupt benefit could have been offered.

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Is it consistent with justice or common sense, that a man is to lose his right because his opponent compels him by a breach of his contract to sue for a penalty, which he neither expected or desired? Mr. Justice Heath says, in *The Bishop of London v. Elyche*, "The law construes bonds according to the intent of the parties, and in all bonds with a condition, the penalty is only considered as enforcing the condition. So, my Lords, although a patron can derive no pecuniary advantage from the presentation to a living, yet if his clerk be not admitted, the law permits him to recover damages in a *quare impedit*." It has been insisted, that advowsons are pure trusts, and that patrons in the execution of these trusts, have no right to consider their families, or adopting any means for reserving presentations for any of their children or relations. This opinion is founded on what Lord Coke says, that a guardian in socage does not take a presentation to a living, because he can make money of it. This doctrine has led to the ridiculous ceremony of the guardian putting the pen into the hands of an infant in his cradle, and guiding its feeble hand while it signs a presentation. But executors and administrators of lay patrons, present to livings that have become vacant in the lifetimes of their testators or intestates. Presentations are not pure spiritual trusts: if they had been so considered, the bishops could never have allowed them to be disposed of by laymen. Advowsons, in gross or next presentations, could never have been permitted to be sold. Archbishops could not leave options to their widows or other lay persons. The learned *Selden* calls the right of lay patrons to present to church livings, "The interest of patronage which the lay founders challenged in their new erected churches." Lord *Kenyon* calls a right of presentation a trust connected with an interest. The founders of lay patronage, when they endowed the churches, reserved the

the right of patronage and the right of taking resignation bonds in favour of their children and descendants. The bishops, by allowing the dedication of tithes to be made on these conditions, obtained a provision for many churches that would otherwise have remained without endowment. As the bishops were to decide on the fitness of the persons to be presented, they wisely thought, that the allowing patrons the privilege of taking such bonds could not injure the church. On the contrary, from the exercise of this privilege, the younger members of the families of great land-owners were brought into the church, and a connection has been kept up between the landed interest and the church, which greatly contributes to increase the security and influence of the latter: at the same time the members of great families are generally better educated, and, from those family connections, likely to be more respected in their parishes, than any other clergymen that can be found. The practice of taking special resignation bonds, and the sanction that such bonds have uniformly received from the Courts of *Westminster*, are the highest evidence that such bonds were allowed by the original compact made between lords of manors and the bishops, when churches were founded. These were some of the interests which *Selden* says, the patrons challenged in their new-erected churches. It has been said, that a clerk who has given one of these bonds cannot subscribe the proper form of resignation, or take the oath administered on his institution. The unhappy men who have taken this oath, and resigned in consequence of bonds of resignation, have been even charged with perjury. This, my Lords, is a dreadful charge against the thousands of worthy persons who have given such bonds, and honourably performed the conditions of them. The objection as to the form of resignation assumes that the words *sponte purá et simpliciter* are an

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essential part of the instrument of resignation. There is no particular settled form of words necessary in a resignation. In *Walrond v. Pollard (a)*, the words are, *animo deliberato, certâ scientiâ et mero motu ex quibusdam causis justis et rationabilibus specialiter moventibus, ultro et sponte dedisse*. Neither these words, nor any thing of the like import, are in the form of resignation given by *Degge*.

But if a resignation in this precise form were required, the only import of the words *sponte purâ et simpliciter* is, that the clerk was not driven by unlawful violence or threats, or seduced by any corrupt agreement, to make the resignation; but that he made it willingly, and because he thought it his duty to make it. With regard to the oath, I admit that by Archbishop *Courtney's* decree, persons presented are required to swear that "*obligati non sunt nec eorum amici pro se juratoriâ aut pecuniariâ cautione de ipsis beneficiis resignandis*." These words are not in the oath prescribed by the Council of *Westminster* 1198, or that of the Council of *Oxford* 1296. The insertion of them by the archbishop into the oath required by his decree, shows that he and those who advised him thought that the oaths previously taken did not reach resignation bonds. The archbishop had no authority to alter the oath, and if any bishop were now to refuse to admit a clerk who declined taking this oath, he would render himself liable to damages and the costs of a *quare impedit*. By altering oaths of office, you may alter the condition, duties, and responsibilities of the officers. Parliament only can do this in civil offices and councils of the clergy, with the approbation of the King. In ecclesiastical, Lord *Coke* says, "a new oath cannot be imposed without the authority of parliament." In 1603 a canon was made, prescribing a form of oath to be taken by persons presented to benefices, and this canon was confirmed by the King. The clergy

(a) *Dyer*. 293 b.

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who assisted at the convocation which made the canon, must have known of Archbishop *Courtney's* decree, and yet they have omitted in the form of oath the words relative to bonds of resignation. How is this omission to be accounted for? Why, either the clergy, or those who advised the crown, thought that bonds of resignation, if not abused, were legal and proper; and, therefore, they would not allow any oath to be administered to clerks, which should prevent them from giving such bonds.

I have heard it said, why will not patrons rely on the honour of clergymen? My Lords, if the clergy cannot give bonds, they cannot pledge their honour. If the one is a violation of their duty, inconsistent with the forms of resignation and their oaths, so is the other.

The last objection to the validity of these bonds is, that they convert an estate for the life of the incumbent, into an estate determinable on a particular event, during the life of the incumbent. Supposing that the clergyman's interest in his benefice be exactly the same as that of a lay tenant for life, there is nothing in the objection, for the condition to resign in the case of a benefice forms no part of the instrument that creates the interest in it: it is made by a separate deed. Now, my Lords, if a tenant for life were to give a bond to convey back his estate on the happening of a particular event, such a bond would not be voidable in law.

The objection is to introducing into the instrument conferring the estate a condition that is inconsistent with it, as when a deed conveys to *B.* an absolute indefeasible estate for his life, and contains a proviso on a certain event that the estate shall determine in the lifetime of the party to whom it is given. Your Lordships will perceive there is more of technicality than reason in this distinction. But no two estates are less like each other than that of a clerk in his benefice and that of a lay

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tenant for life; they are created with different objects; conditions are annexed to one which are not annexed to the other; the clergyman, to preserve his estate, must perform the duties of his church. If he takes another benefice without a dispensation, he vacates the first. These conditions arise by the original compact between the leaders of the church and the clergy, that I have already referred to.

My Lords, I humbly hope that I have proved that the judgment of this House in *The Bishop of London v. Fytche* does not bear on the question now to be decided by your Lordships; that no principle can by any just legal reasoning be deduced from that case that is applicable to this; that securing a benefice for a brother or friend is not a profit or benefit within the meaning of the statute of *Elizabeth*, that these general terms must, according to the true and established rules for construing penal statutes, be restrained by the particular words that precede them, and holden to mean any benefits of the same sort as those particularly specified; that the taking these bonds is not an abuse of the right of patronage, as that right stands according to the common law, and that they are not inconsistent with the estate which incumbents have in their benefices; that these bonds appear to have been used from the earliest times both by ecclesiastical and lay patrons and have been uniformly supported by the judgments of the Courts of *Westminster*; that the consequences of declaring these bonds void will not be confined to the injury done to the long-established rights of patrons, it will let in a laxity in the mode of construing penal statutes, that will deprive persons accused of crimes of the benefit of that humane rule which secures from punishment all whose offences are not clearly within the letter as well as the spirit of the law. The judgments of the Courts of *Westminster Hall* are the only authority

rity that we have for by far the greatest part of the law of *England*. The overturning the long series of judgments which declares the validity of these bonds, must introduce uncertainty and confusion into every branch of the common law. Can it be said that the law which governs these bonds is unjust? No, my Lords: the injustice is in destroying, without compensation, a vested right. Can it be said that they are inconsistent with the policy of our laws? That policy encourages us to provide for our children, relations, and friends, and allows us to bestow on them offices for which they are duly qualified. In ecclesiastical benefices the public have a security for the fitness of the person presented, which does not exist in other cases. The bishops are to take care that neither friendship nor natural affection puts a clerk into a church who is not duly qualified to do the duties of it. If a patron may give a living to his son, or relation, or friend, what objection is there if it becomes vacant when the person for whom it is intended is incapable of taking it, to his permitting some other person to hold it until the incapacity of the first object of his choice be removed? It has been said this can be done in the case of no other office. There are no other offices that have been created by the patrons and endowed out of their estates; and, therefore, there could be no legal origin for the right to take such bonds in any other offices. With respect to other offices, there are no judicial authorities to support such a right. Your Lordships will not suppose, that, by holding these bonds to be void, you will make patrons forget their families, and look out, unbiassed by affection or friendship, for the most worthy clergyman to fill the vacant benefice. Many of them will act as some patrons have done where a living, the presentation to which they are desirous of selling, becomes void before it is sold, — they will present some old man. By whom are the duties

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of an incumbent likely to be best performed? A young man in full health under a bond of resignation, or an old one, who has just enough of life left not to be liable to be objected to by a bishop on account of his imbecility?

Many owners of manors with advowsons annexed, will sell the advowsons from the manors. Those who pay large sums of money to purchase advowsons in gross will not be the most likely persons to hold such advowsons as pure trusts, and in disposing of them to look only to the maxim, *detur digniori*. Such alienations of church patronage will break the connection between the landed interest and the clergy. The young men of family are, from their educations and habits, likely to make the best parish priests. From their connections with the owners of lands in the parishes all the inhabitants feel a respect for them, which must add much to the effect of the instruction they give. Connection with proprietors of the soil gives to the clergyman the greatest interest in the happiness of his parishioners, and stimulates him to promote their spiritual welfare. Such persons will not take orders when the livings which their ancestors founded are severed from their families. I am aware these are rather considerations of policy than law. But, my Lords, if there be any doubts what is the law, Judges solve such doubts by considering what will be the good or bad effects of their decision. I say, nearly in the words of one of the bishops in *The Bishop of London v. Elyche*, that doctrine cannot be law which injures the rights of individuals, and will be productive of evil to the church and to the community.

ABNORR C. J. The question, my Lords, which has been proposed to the Judges is, whether sufficient matter appears upon the record to show that, either by statute or common law, the bond upon which the action

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of debt was brought in this case, and stated upon the record to bear equal date with the writing of presentation therein mentioned, is void or illegal?

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My Lords, the question appears to me to consist of two parts; first, whether enough appears on the record to show that the bond was given as the price or consideration of the presentation to the benefice? Secondly, supposing this to appear, then whether the bond is void by the statute or the common law?

As to the first part of the question, I am of opinion that enough does appear upon the face of the record to show that the bond was given as the price or consideration of the presentation to the benefice. If the fact be manifest upon the face of the instrument, it is not necessary to aver it in order to bring it to the notice of the Court or within the meaning of a statute; and that the fact does so appear, it is only necessary to advert to the language of the condition.

In this case, my Lords, the statute mentions the act alone, without any epithet or qualification. The section commences with this preamble: "For the avoiding of simony and corruption in presentations, collations, and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same, be it enacted, that if any person shall or do at any time," after such a period, "for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, &c. of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person, &c. to any benefice, that then such presentation shall be utterly void." It is to that section to which I would beg to call your Lordships' attention, from which it appears, that the mere taking of any gift, profit, or benefit is in itself an avoidance of the presentation. It is necessary,

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sary with respect to any question that may arise upon the statute of *Elizabeth*, or any question that may arise upon the common law, to see what the fact is, the question being whether it is apparent upon the face of the instrument that the bond is given as the price of the presentation. It seems to me impossible for any person to read the condition of this bond as it appears upon the record, without taking it that it was given as the price of the presentation, and that the presentation was given as the consideration of the bond.

It begins with reciting, that *Lewis Richard Lord Soudes* is the patron of the rectory, which rectory had become vacant by the death of the late incumbent. The next recital is, "That my Lord *Soudes*, by writing under his hand and seal, bearing equal date with the above written obligation, presented the above bounden *Bride William Fletcher* to supply the vacancy;" from which it appears that the presentation and bond are connected together; and then it goes on, "and whereas the said *Bride William Fletcher* has agreed to resign the said rectory into the hands of the proper ordinary upon such request or notice as hereinafter mentioned, so as that the said rectory may thereby again become vacant." Can any person read this and not conclude that the presentation and the bond were concurrent acts, — that they were founded upon a prior agreement to resign? This was evidently the opinion of Lord *Mansfield* in *The Bishop of London v. Elyote*. That being so, my Lords, for the reasons which I have just given to your Lordships, I am of opinion that there is enough upon the face of the record to show that this bond was given as the price of the presentation.

Then, my Lords, the second inquiry which arises is, whether such a bond, given as the price or consideration of the presentation is void in law. Upon this question I conceive the true inquiry to be only whether this bond

is within the rule and principle of the decision in the case before mentioned of *The Bishop of London v. Hytch*. I consider, my Lords, that case to have established a rule and principle binding upon all jurisdictions except that of your Lordships' House. It is true that the question there arose directly upon the presentation, and not upon the bond; but it is treated throughout as being one and the same: and as the presentation and the bond are the price and consideration of each other, it seems impossible to say that the one can be good and valid, and the other bad and void. That case, my Lords, arose upon a presentation accompanied by a bond to resign upon the request of the patron; a general resignation bond, as it has been called. The present case arises upon a presentation accompanied by a bond to resign upon request, whereby and so as that the patron may be enabled to present one of his two brothers, in the condition named, when each of them as is to be presented shall be capable of taking an ecclesiastical benefice; the agreement having been that the presentee should so resign to the intent that the patron may present one of these two persons. This, therefore, my Lords, is one of those that have been called special resignation bonds.

The declared object of the resignation is the presentation of one of the two persons named; but, as the resignation of the incumbent must precede the presentation of another clerk, I am at a loss to know how the presentation of the particular clerk is to be secured or enforced, or the incumbent restored to the benefice, if the patron, after having declared his intention to present one of the nominees, shall afterwards think fit to present another person. This would, undoubtedly, be a most dishonourable act, and I beg to be understood as not even surmising that the noble Lord who is a party to this suit would act in this manner. But in deciding

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upon a question of law, your Lordships cannot look at the rank and character of particular persons. It has been said at the bar that a court of equity may prevent an ill use from being made of such a bond. I do not presume to say that this may not be done, if the intention to make an ill use be known and ascertained before resignation; my difficulty is, to see how this can be known and ascertained, unless a patron should be weak enough to avow it; and this cannot be presumed of a person who could act in the way I have supposed; and if after resignation the patron should present another person, how could the ordinary refuse institution? Suppose the presentee to die in the interval between resignation and the new presentation, or that he should obtain a better benefice not tenable with this, and on that or on any other account refuse institution, how is the incumbent to be restored, though the object of his agreement and of his resignation have failed? If these difficulties cannot be overcome, then the bond in question will enforce a resignation, whenever one of two persons named shall be capable of taking a benefice, leaving the patron at liberty, in many, if not in all cases, to present whom he will.

But supposing, my Lords, these difficulties can be overcome, or be thought not really to exist, and the bond be considered only as enabling the patron to present one of his two brothers, still I am of opinion, upon the authority of the decision so often mentioned; that this bond is void in law. That decision may be considered as founded principally upon one or other of two reasons, or perhaps upon both; the reasons being either that the bond there mentioned was within the statute of *Elizabeth*, and so void by that statute; or that the effect of the bond was to convert into an estate at will, an office which the law considers to be a freehold,

and will not allow to be less than a freehold; and so the bond is void at common law.

I consider, my Lords, the bond now in question to fall within each of those reasons, and to differ from the general bond in degree only, and not in principle or kind. If it be a benefit to a patron to be able to call for a resignation whenever he may choose to present any other person, it must, in my opinion, be a benefit, though perhaps a less benefit, to be able to command a resignation in order to present a relation or friend. And if there be any benefit, the degree of benefit must be immaterial, and the case will be within the statute. If the law will not allow a benefice to be held absolutely at the will of the patron, and voidable whenever he may choose to present any other person, in my opinion, the law cannot allow a benefice to be so held as to be avoidable when a relation or friend of the patron may be capable of taking it, and the patron may think fit to present him; for in each case the estate or interest of the incumbent will be less than a freehold; whereas a benefice is spoken of as a freehold in all our books, whatever it may have been in its origin, or first constitution, which are now lost in the obscurity of antiquity.

But further, my Lords, it is not only required that a benefice shall be freely given and freely taken, but if resigned, it must also be freely and voluntarily resigned. *Non metu coactus sed in spontanea voluntate.* And how can a resignation be voluntary which is made in order to avoid the penalty of a bond, whether the patron has a right to impose the penalty at his pleasure, or only for a particular purpose? And ought the law to sanction an instrument which places a clergyman in a situation, either to subject himself to a demand which he may be unable to pay, or to make a solemn declaration contrary to his conscience and to truth? In my opinion, the law ought not to permit this.

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Again, my Lords, the bond in question enables the patron to command a resignation in favour of one of his two brothers. If such a bond should be held valid, where is the line to be drawn, or what limit is to be fixed? If it be good in favour of brothers, why may it not also be good in favour of cousins, or more remote kindred, or of friends? If it be allowed in favour of two persons, why may it not be allowed in favour of more than two — of twelve, of twenty, or even a greater number? I am unable to discover any rule or principle upon which it may be said, thus far shalt thou go, but no farther; and I infer, therefore, that no step must be taken towards the accomplishment of an object, which may reserve any benefit of this nature to the patron, or make the interest of the incumbent less than that freehold or estate for life, to be forfeited only for misconduct or by a regular judicial proceeding, which the law supposes him to possess, and requires that he shall be permitted to enjoy.

For these reasons, my Lords, I am of opinion that enough appears upon the face of this bond, to show that it is void and illegal.

The LORD CHANCELLOR: Upon the first question, my Lords, which arises in this case, I have no difficulty in saying that I am most clearly of opinion that enough does appear upon the record to enable your Lordships to say whether the bond in question is void or illegal either by statute or common law. I feel very great satisfaction that this question is now in the course of determination by the highest court of judicature in this kingdom, because that decision, speaking for myself, will greatly tend to relieve my mind from doubts which I have entertained when applications have been made in the Court of Chancery with reference to these special bonds of resignation, for I could never bring my mind

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to that satisfactory conclusion which perhaps it was my duty to do, before I proceeded to take any step in such a case without the question with respect to these special bonds of resignation having been deliberately argued and deliberately adjudged by a court of common law; for I protest I feel myself obliged to doubt very much whether much attention ought to be paid to those decisions which have passed without argument at the bar, and which passed without a word having been said by the Court. Such was the case, my Lords, with respect to this very case, in the court where it was originally considered, as well as in the court of error, for I do not understand that a word was said upon it either by counsel or Judges. That being so, a writ of error was brought to this House, and the question has been intelligibly argued at your Lordship's bar, and after having heard that argument, it has been spoken to by the learned Judges in such a manner as well satisfied me in saying, that it was a subject which would have borne debate in the court below; and therefore, my Lords, after it has been spoken to with so much ability by these different Judges who have had the opportunity of giving a year's consideration to it, I trust that your Lordships will not think it an unreasonable request to ask that a few days more should be permitted to elapse before a motion is made calling upon the House to proceed with its judgment. (a)

On *Wednesday* 17th *May* 1826, it was moved and ordered, that the further consideration of this case be adjourned to the next session.

(a) The final judgment in this cause not having been pronounced when the Judges delivered their opinions in *Easter* term, the publication of them was then deferred. But they are now given with the cases of *Trinity* term, the earliest opportunity being embraced for the publication of so important a decision.

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A bond for resigning a living in favour of one of two brothers of the patron, is void.

On Monday, April 9th 1827, the Lord Chancellor delivered the decision of the House of Lords as follows.

Having gone through all the circumstances of the case, he said, the question now for the consideration of their Lordships was, whether this was a bond on which the party was entitled to sue; and in coming to a conclusion on this subject their Lordships should consider themselves as judges in a court of justice, and his duty was not to state the case on any other ground than that which was warranted by law. He had not the slightest hesitation in saying, that before the decision given in the case of *The Bishop of London v. Eytche*, this bond would have been held legal, but he was of opinion that it came within the principle which governed that decision. It had been argued by counsel at the bar that this bond could not be considered simoniacal, as the condition of the resignation was the presentation of a particular person, and that the obligee might sue, and the Bishop take care that on the resignation, no other person should be presented but the Rev. *Henry Watson*, the brother of Lord Sondes. Now, if the resignation were conditional, it would cease to be a resignation at all, and after an incumbent had resigned, was there any law upon earth which could compel a patron to present any particular person? It had already been decided in several instances, that a resignation, to be good, must be *pura et absque conditione*, otherwise the law said it was no resignation, or it was void. True it was, that two or three eminent persons were adverse to the decision in the case of *The Bishop of London v. Eytche*, among whom was Lord Kenyon, to whose opinion in legal matters he paid the highest respect, and it was consequently urged, that that decision should govern no other case except such as was strictly in point, but his Lordship thought that there was nothing in the present case which should take it out of the rule by which that decision

cision was governed. *The Bishop of London v. Efyche* was a bond of general resignation, and if the incumbent resigned in the present case, could not the patron present whom he pleased? How then did it differ from a bond of general resignation? It had been urged, that if this bond should be judged simoniacal, the incumbent and the patron would be subject to heavy penalties, but it was their Lordships' business not to attend to any thing but to the subject proposed for their consideration. How could they with propriety pronounce against the law to avoid the consequences of an illegal act? When he looked to the cases in the books, which were advanced in support of this judgment, he should say they were not well considered. One of them said, that a bond of resignation might be made in favour of a brother; another said, in favour of a cousin or a near relation. But he would ask, what had the condition or relationship of the person in whose favour the bond was made to do with the question? That ought to be left out of consideration. Could a patron take a bond in favour of himself? If not, he could not take it in favour of any man on account of relationship, for no man is more nearly related to a patron than himself; and, if he could take such a bond, it would in construction of law be the same as a general bond of resignation, for it was evident he could present whom he pleased after. But, again, it was said, that it could not be held simoniacal, unless it appeared that some benefit could be derived from it. Might not such a bond be made covertly in consideration of money, in this manner; — when the time for resignation arrived, the patron might say to the clergyman, “If you pay me a certain sum of money, I will allow you to hold your living longer.” Could not such a thing be easily effected? He had no doubt but that this decision would come by surprise, and bear harshly on many patrons and clergymen; but he was not one of those who would

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hesitate to indemnify those who had hitherto committed themselves by such bonds, whether patrons or incumbents, provided that were done without touching on the general principles of the ecclesiastical laws of the country, some of which, it should be admitted, were severe. On the grounds before mentioned, he did not see how he could do otherwise than adjudge this a simoniacal contract: now, therefore, after the most profound consideration, he would move their Lordships, that the judgment in the Court below be reversed.

Judgment reversed accordingly.

The ARCHBISHOP OF CANTERBURY entirely concurred in the opinion of the Lord Chancellor, which was agreeable to that of the majority of the Judges; but he had to implore their Lordships' attention to this circumstance, that a large number, both of patrons and incumbents, had exposed themselves to severe penalties. His Grace trusted, that, however erroneously, they had thus committed themselves, that House would afford them protection. He held in his hands a bill containing such restrictions as would protect bonds of this nature heretofore made, and exempt the parties from the penalties above alluded to; with their Lordships' permission he would move that it should be now read *pro forma*, and on the second reading he would explain its provisions.

The LORD CHANCELLOR put the question, and the bill was accordingly read a first time.

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TUCKER v. WRIGHT.

June 6.

TADDY Serjt. had obtained a rule calling on the Plaintiff to show cause why the proceedings in an action of trover should not be stayed, upon the delivery to the Plaintiff of certain parcels of cloth, (to recover damages for the conversion of which the action had been brought,) or upon payment of the value thereof, and of the value of certain other parcels disposed of by the Defendant.

In an action of trover, where the value of the goods converted was not ascertained, the Court refused to stay proceedings upon delivery of the goods to the Plaintiff or payment of the value thereof.

The affidavits on which the motion was made alleged that one *Elstone* sold to the wife of the Plaintiff certain cloth at 2s. 6d. a yard, which she delivered to the Defendant for the purpose of covering some chairs; that the chairs having been covered and returned, he retained eighteen yards remaining, for a debt due to himself and his partner, and afterwards, without legal warrant, entered the Plaintiff's premises and took the chairs for another debt due to him from the Plaintiff. For this violence the Plaintiff had already recovered in an action of trespass, from imprisonment for the damages and costs of which action the Defendant had been discharged under the insolvent debtor's act, and the Plaintiff now sought to recover damages for the detention of the residue of the cloth which had not been employed in covering the chairs, but which had been sold by the Defendant for part of his debt.

Taddy referred to *Pickering v. Truste (a)*, in which the Court of King's Bench acceded to a similar appli-

(a) 7 T. R. 53.

1826.

TUCKER

v.

WRIGHT.

cation in trespass; and *Brunsdon v. Austin* (b), where a defendant in trover was, upon terms, permitted to surrender a part of a steam-engine which he admitted the plaintiff to be entitled to.

Wilde Serjt. opposed the rule, on the ground that there was a complicated dispute between the parties, and the value of the cloth was not ascertained.

BEST C. J. Such a motion as this was never made before, and if acceded to, it would in effect convert the officers of this court into a jury.

Where complete justice can be done by the delivery of a specific chattel, the Court will sometimes interfere to stay proceedings; but there is no instance in which the Court has interfered with the intention of referring it to the officer of the Court to ascertain a disputed value, and to place himself in the situation of a jury. In *Pickering v. Truste* the value of the goods was admitted, and in *Brunsdon v. Austin* there was no dispute on that head.

The property here has been in the Defendant's hands a long time, and may have been materially injured. There is no pretence for the motion.

PARK J. The case of the steam-engine has no bearing on the present, and the rule in the books applies to instances in which trover has been brought for a specific chattel, and there have been no circumstances to enhance damages.

BURROUGH J. I am clear this never was done, and never will be done.

GABLEE J. concurring, the rule was

Discharged.

1826.
 REPORT
 OF THE
 JUDGES
 June 6.

MOORE v. KENRICK.

THE Defendant having been arrested under an original *capias*, original bail were put in in *Middlesex*, and added bail, afterwards taken before a commissioner in *Denbighshire*, were then put in before the filacer for *Middlesex*.

Practice. Bail.

This was objected to by *Wilde Serjt.* as irregular; but

The Court, observing that the authority to the commissioners was to take "all and every such recognizance as any person shall be willing to enter into before you in your county," determined that there was no ground for the objection.

SELLECK v. SMITH, KEELING, and DRAKE.

June 7.

TROVER for sugars. At the trial before *Best C. J.* *Middlesex* sittings after *Easter* term last, it appeared that the Plaintiff, a merchant at *Savannah*, in the *United States*, being indebted to *John Griswold*, of *New York*, shipped the sugars in question in *America*, and addressed the bill of lading to *Richard Pettitt*, in *London*, with

Plaintiff being indebted to *J. G.*, shipped goods under a bill of lading addressed to *R. P.*, with directions to him to sell the

goods on Plaintiff's account, and place the net proceeds to the credit of *J. G. R. P.* having pledged the goods, Held, that the Plaintiff had a sufficient title to sue in trover, and that the right to the possession of the goods was not in *J. G.*

Gaselee J. dissentiente.

1806.
 SUGARS
 .
 SUGARS.

instructions to him to sell the sugars as soon as practicable after their arrival, and to place the net proceeds to the credit of *John Griswold*, who drew bills on *Pettitt* to the probable amount.

The invoice stated the Plaintiff to be the shipper of the sugars, and was accompanied with a letter from the Plaintiff to *Pettitt*, instructing *Pettitt* to sell the sugars on Plaintiff's account. Before they arrived, *Pettitt*, representing himself as the owner of them, obtained from *Keeling and Drake*, his brokers, an advance, in anticipation of the proceeds, and then endorsed the bills of lading, "Deliver the within contents to the order of Messrs. *Keeling and Drake*." Shortly after this *Pettitt* absconded, and became bankrupt, but he previously handed over to *R. A. King* the Plaintiff's and *Griswold*'s letters, and requested him to take charge of the consignments, and provide for the bills drawn by *Griswold*. Upon these instructions from *Pettitt*, *King*, on behalf of the Plaintiff, demanded the sugars of the dock company, but they were refused, and the Defendants, acting under the bill of lading, proposed to sell the goods still lying in the docks. *King* then put a stop on them, but the Defendants having proceeded to sale after indemnifying the dock company, he demanded the proceeds. The Defendants made no objection on the score that he was not authorized by the Plaintiff, but refused the proceeds; and the Plaintiff then commenced the present action. Orders from the Plaintiff to *King*, confirmatory of *Pettitt*'s instructions, arrived after the sale of the goods. In an answer in Chancery, put in by the Plaintiff in the course of these disputes, it was asserted that the property of these goods was in the Plaintiff, and that he had entered into an agreement for securing *Griswold* the payment of his debt. It appeared also in this answer that *Griswold* had insured on behalf of Plaintiff,

1886.

SALMON

v.

SMITH.

this were so, the Plaintiff could have no right to possession. At any rate, the goods having been disposed of by a party who was intrusted with the management of them, his demand by the Plaintiff was necessary before he could sue. But King was only employed by Pattitt to superintend the sale, and had no authority from the Plaintiff to make any demand. With regard to the supposed subsequent ratification of the demand, although the principle of ratification might sometimes save the actor from the consequence of tortious acts, it could never make a defendant a wrongdoer by relation.

But the Plaintiff, at all events, by demanding the proceeds, adopted the sale, which he could not afterwards repudiate, and treat as a tortious act; *Stierneld v. Holder*. (b) So that even if he might have sued for money had and received, he could not sue in trover.

BARRON C. J. Three objections have been made to the Plaintiff's recovering in this case; first, that at the time of the conversion of the goods by the defendants, he had no right of possession; secondly, that the party who demanded the goods had no authority for that purpose; and thirdly, that the Plaintiff, by claiming the proceeds of the sale effected by the Defendants, waived all right to sue them in trover.

Without speculating on what was intended, but judging by what was done, I think the right of possession was in the Plaintiff; but it does not appear that it was even intended to convey the right of possession to Griswold, because if it had been so intended, the bill of lading might have been indorsed to him, and he might have indorsed it to Pattitt.

The Plaintiff was the shipper of the goods, and as such was legal owner, with right of possession; and I

(a) 1 *Ryan & Moody*, 219. 4 B. & C. 5.

see nothing in what has passed to disest him of this right.

It appears by the invoice that the Plaintiff was the shipper, and Pettitt was to sell the goods subject to an equitable claim in *Griswold*, not to possession, but to be reimbursed out of the proceeds of the sale. *Griswold* was content with a security short of a legal right, and relied on Pettitt for the due execution of the trust reposed in him. While the goods were in specie, therefore, they belonged to the Plaintiff, whose title was not so infirm even as that of a mortgagor; for the Plaintiff's answer in Chancery asserts the property and possession to be in the Plaintiff, and only admits an agreement to pay *Griswold* out of the proceeds. But a mortgagor in possession may sue in trover any party except the mortgagee; and admitting *Griswold* to be mortgagee, yet if he permits the mortgagor to remain in possession, as against him a wrongdoer cannot set up *Griswold's* title.

A mortgagor of real property, though he cannot maintain ejectment, may maintain trespass against any wrongdoer, except the mortgagee; and where trespass would lie for the possessor of real property, trover will lie for the possessor of personalty. If it were otherwise, the greatest inconvenience might be incurred, and a mortgagor who resides here might be prevented from suing a wrong-doer, though the mortgagee might be on the other side of the world.

With respect to the alleged insufficiency of the demand which was made on behalf of the Plaintiff, I think no demand was necessary. Pettitt had no authority to pledge the goods, and the Defendant's possession was wrongful: — in *Stiernel v. Holden*, the goods, though delivered to a broker who made advances, were delivered, not as a pledge, but to be sold, and were sold, in the usual course of business: — but if a demand were necessary,

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XSELLER

or.

3607.

1851
Sess. 1852
or
Sess. 1852

any, King had abundant authority to make it, even though he had acted under *Pettit* only.

The demand for the proceeds of the sale not having been complied with, the Plaintiff was not prevented by that demand from suing afterwards in trover.

PARK J. When the facts of this case are clearly understood there can be no difficulty about the law.

The plaintiff was indebted to *Griswold* before the shipment of the sugars in question, but although he was so indebted, it appears by the invoice and the bill of lading that the sugars were shipped in his name, and a letter was written by him at the same time to *Pettit* to sell the sugars on his (Plaintiff's) account.

If *Griswold* meant to take the legal interest in the property, he should have done so at the time of the shipment, and have consigned it in his own name.

It appears, too, from the answer in Chancery, that *Griswold* insured on the behalf of the Plaintiff, and that he wrote a letter, in which he says, "Mr. *Selleck* wishes the sugars to be sold." If the property in them were once vested in him, how was it divested?

With respect to the demand, I am inclined to think that it was unnecessary; or, if necessary, that King had sufficient authority to make it.

BURROUGH J. Nothing was ever done to alter the right of the Plaintiff on the bill of lading; the right of possession was never out of him, and *Griswold* had no more than an equitable claim.

CHATELAIN J. I agree with the opinion of the Court in all respects but one. I doubt whether the Plaintiff has sufficient interest to maintain trover. Undoubtedly a mortgagor in possession may maintain trover; but I think that the plaintiff was mortgagor out of possession, and

and *Griswold* mortgagee in possession, the bill of lading operating as a conveyance of the goods to *Plaintiff* as agent of *Griswold*. If it were otherwise, why should the whole of the proceeds have been made payable to *Griswold*?

1835
Sess. 2nd
or
Sess. 2

The rest of the Court, however, entertaining a different opinion, the rule must be

Discharged.

PAGET v. THOMPSON.

June 8.

CROSS Serjt. opposed a rule obtained by *Wilde* Serjt. calling on the Defendant to show cause why the Defendant's appearance entered on the filacer's book should not be struck out, and why, if the Defendant should appear by guardian, his plea should not be made conformable thereto, and why the Defendant should not pay the Plaintiff his costs occasioned by the Defendant's attorney having appeared and pleaded for Defendant by attorney, knowing him to be an infant, and why the Defendant should not be obliged to accept notice for trial for the sittings after this term.

Practice.
Infant.

Cross struggled hard against the infant's paying costs, but

The Court said he might have redress against his attorney, and made the rule absolute; thinking the proceeding a trick to enable the Defendant to take advantage of the objection on error.

Rule absolute.

Defendant ought to have done for the public, with respect to the notes received, what he would do for himself in respect of his bets, namely, keep an account. But the Defendant received the notes on a bad consideration, for though horse-races are legalized to a certain extent by 13 G. 2. c. 19. and 18 G. 2. c. 34., yet bets upon them are void under 9 Ann. c. 14.

1828
 SNOW
 v.
 SADDLER.

Wilde contra. The Defendant exercised sufficient caution; at least, as much as circumstances admitted. It is not possible in the hurry of a race to take the numbers of notes. *Gill v. Cubitt* was the case of a tradesman and a check, not a bank note, which is equivalent to money; and a tradesman behind a counter has leisure and means of inquiry which are denied to a party on a race-course.

The argument taken from the statute of *Anne*, if tenable, would go to show that the Defendant could not have supported an indictment if he had been robbed of the bank-note.

The Court granted a new trial on payment of costs.
 Rule absolute.

SELBY v. EDEN.

THE Plaintiff declared that one *N. Atcheson*, by his bill of exchange, required the Defendant three months after date to pay to the order of *N. Atcheson* in London 498l. 15s., which bill the Defendant at London the drawer in London, and accepted by the Defendant at London, according to the usage of merchants:

The declaration on a bill of exchange stated it to have been drawn payable to the order of

Held, that averment and proof of presentment for payment in London, or of excuse for non-presentment in London, were unnecessary.

accepted

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 {
 Grant
 vs
 Bland

accepted according to the usage and custom of merchants; thus, *Atkinson* endorsed the bill at London to the Plaintiff, of which endorsement the Defendant at London had notice, by reason of which the Defendant became liable, to pay the Plaintiff the amount of the bill, according to the tenor of the bill and of his acceptance.

At the trial before His C. J., London sitting in Easter term, it was objected on behalf of the Defendant, that as the bill was drawn payable to the drawer's order in London, presentment in London ought to have been availed and proved. The Chief Justice overruled the objection, and a verdict was found for the Plaintiff.

The learned Judge, in Easter term, moved to arrest the judgment, upon the objection made at the trial.

He contended that the present case did not fall within the provisions of the 1 & 2 G. 4. c. 78., (which enacts that an acceptance made payable at a banker's shall be deemed a general acceptance, unless accompanied with the words "and not elsewhere,") that, according to its title, being confined to acceptances, and applied only to cases where the bill is by the acceptance made payable at a particular place; and not to cases where the drawer makes it so payable by the language in the body of the bill. This, then, was a general acceptance of a bill drawn payable in London, and the statute not having proposed to alter the effect of a general acceptance, the case must be considered as a case before the statute; but before the statute, on such a bill, presentment to the acceptor in London was a condition precedent to the holder having any claim against him; or at all events, an averment that due diligence had been used, without success, to find his place of business. He cited *Saunderson v. Bowers* (a), *Dickinson v. Bames* (b) and *Howe v. Bowers* (c).

(a) *Bayly on Bills*, 96. 3d edit. (b) 26 *Bar*, 110. (c) 21 *Bar*, 110.
 T III *White*

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OF
LAW

Wilde Serjt. The object of the statute 1 & 2 G. 4. c. 78. would be defeated, if an acceptance payable at a particular place by reason of the language used by the drawer were not as much within the operation of the act as an acceptance made payable at a particular place by reason of the language used by the acceptor.

Independently, however, of the act, enough appears on the declaration to show the defendant's liability. In an action against an acceptor an averment of presentment is not necessary; the action is a sufficient demand; and the holder is not limited to place in making his demand; 1 *Roll. Abr.* 448. *Condit. (Q)*. *Com. Dig. Condit. (G. 9.)* nor to time; *Turner v. Hayden.* (a) After the bill is due, the amount is payable on demand, and an averment of request is not necessary. *Huffman v. Ellis.* (b)

Bosanquet was heard in support of his rule, in this term; and the Court having taken time to consider,

Best C. J. now delivered judgment. In this case it is unnecessary for us to consider, whether, independently of Serjt. *Onslow's* act (c) the declaration ought to have contained an averment that the bill was presented for payment to the acceptor in *London*, or an excuse for non-presentment; because we are all of opinion that the omission is cured by that act. Perhaps the preamble of the act does not apply to such a case as the present, but it is a remedial statute; and the enacting part seems clearly to embrace every instance in which a bill is made payable at a particular place: "If any person shall accept a bill of exchange payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill."

The words of the act embrace any bill payable at a bankers or other place; and no distinction is made be-

(a) 2 *Bull. C. L.* 1. (b) 1 *Roll. Abr.* 448. (c) 1 *Roll. Abr.* 448.

1881.
S. 119
W.

when the case where the bill is rendered so payable by the language of the drawer, and the case where it is rendered so payable by the language of the acceptor. If the bill be drawn payable in London, and accepted as drawn, that is, a general acceptance, unless the acceptor adds the words provided by the act for limiting the acceptance, "and not elsewhere." The acceptor has not done this, and we are, therefore, of opinion that judgment ought not to be arrested. Rule discharged.

June 9.

GUEST v. WILLASEY and Others.

Three codicils of different dates were indorsed on a will duly attested for passing real property. The first referred to lands mentioned in the will, made a disposition of lands purchased subsequently to the will, according to directions in the will as to the devisor's lands in general, gave a legacy to the devisor's wife, and appointed her executrix, in addition to the executors named in the will: it was attested by only two witnesses. The second, which also was attested by only two witnesses, referred to lands mentioned in the will, gave directions touching the sale of a portion of them, revoked a legacy given by the will, and appointed two new executors in the room of those mentioned in the will. The third merely appointed a new executor in the room of the executor named in the second codicil, and was attested by three witnesses.

IN this case (sent by the Master of the Rolls for the opinion of this Court, and reported at length, ante, vol. ii. 429.) three codicils of different dates were indorsed on a will, duly attested for passing real property. The first referred to lands mentioned in the will, made a disposition of lands purchased subsequently to the will, according to directions in the will as to the devisor's lands in general, gave a legacy to the devisor's wife, and appointed her executrix, in addition to the executors named in the will: it was attested by only two witnesses. The second, which also was attested by only two witnesses, referred to lands mentioned in the will, gave directions touching the sale of a portion of them, revoked a legacy given by the will, and appointed two new executors in the room of those mentioned in the will. The third merely appointed a new executor in the room of the executor named in the second codicil, and was attested by three witnesses.

Held, that the third codicil operated as a republication of the first.

executor

executor in the robes of the executor named in the second codicil, and was attested by three witnesses.

The Court held that the third codicil was a republication of the second and of the will, and that lands purchased subsequently to the will, and mentioned in the first codicil, passed according to a disposition made in the will as to the deviser's lands in general.

Whether the third codicil operated as a republication of the first, they intimated there might be some doubt; but as the republication of the will passed the subsequently purchased lands on the same trusts as the first codicil if properly executed would have done, they deemed it of no importance to consider the question further. The case, however, was now remitted to the Court for their opinion as to the republication of the first codicil.

Cross Serjt. contended, that the three codicils being not only annexed to the will but written on the same paper, the third was a republication of the first; *Attorney-General v. Downing (a)*, and the authorities there cited. (The doubt might, perhaps, have been occasioned by the circumstance that in *Barnes v. Crow (b)*, the codicil was not only annexed but contained a reference to the contents to the will. Annexation, however, was, according to the authorities referred to, sufficient of itself.

Spankie Serjt. *contra*. A codicil, in order to effect a republication of a will, must clearly refer to it: *Barnes v. Crow*. The third codicil refers to the second only, from which an intention to exclude the first may be presumed. Besides, if the third codicil be a republication of the first, and with that, of the will, it brings the will down to the time of publishing the third codicil; and this would be incompatible with the will, which directs, that the deviser's estate shall be sold by per-

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GROVE
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(a) *4th 111*; (b) *5th 486*

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sons who, under the second codicil, ceased to be trustees or executors.

The only question for the consideration of the Court now is, "Whether the third codicil operated as a republication of the first codicil?"

The following certificate was afterwards given:

We have heard this case argued by counsel, and are of opinion that the third codicil operated as a republication of the first codicil.

W. D. BASTO
J. A. PARKER
J. BURGESS
S. CLARKE

June 10.

RALEIGH TREVELYAN v. JOHN TREVELYAN and Others.

Settlement of premises to T. S. and his heirs, to the use of W. T. and his heirs, until a marriage between R. T. and E. G.; then to the use of W. T. for the life of R. T., with several limitations over on the death of R. T. in favour of his wife and children, with a term for 300 years in T. S., to commence on the death of R. T., for securing a rent-charge to the wife of T. S., and determining on the performance of this trust; and subject to the foregoing, to W. T. and his heirs.

The following case was sent by the Vice-Chancellor for the opinion of the Court of Common Pleas, Walter Trevelyan being seized in fee-simple of the lands, tenements, and hereditaments thereinafter mentioned, by indentures of lease and release, bearing date respectively on or about the 1st and 2d days of June 1819, the release being made or expressed to be made between Walter Trevelyan, of the first part, the Plaintiff, Raleigh Trevelyan, of the second part, Robert Grey, then so described, of the third part, Elizabeth Grey, then so described, her personal and legal representatives, and assigns, over on the death of R. T. in favour of his wife and children, with a term for 300 years in T. S., to commence on the death of R. T., for securing a rent-charge to the wife of T. S., and determining on the performance of this trust; and subject to the foregoing, to W. T. and his heirs.

W. T. died before the marriage of R. T., who was his heir at law, leaving a will and executors: Held, that the executors did not take any interest in the premises, and that R. T. took a fee in them, subject to the term for 300 years therein

therein

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 TREVELYAN.

ation of the term of 300 years, and subject thereto, in the mean time, to the only proper use and behoof of *Walter Trevelyan*, his heirs and assigns for ever: and it was thereby provided, that when the trust thereby declared of the said term of 300 years should be performed, the term should cease.

The marriage took effect.

Walter Trevelyan departed this life subsequently to the date of the indenture of settlement, but previously to the solemnization of the intended marriage.

Walter Trevelyan left the Plaintiff, *Raleigh Trevelyan*, his eldest son and heir at law, him surviving. *Walter Trevelyan* duly made and published his last will and testament in writing, dated 13th May 1818, and appointed *John Trevelyan*, *Thomas Singleton*, and *William Orde*, executors thereof, and they duly proved the same in the proper ecclesiastical court.

The question for the opinion of the Court was, Whether the executors of *Walter Trevelyan*, under or by virtue of the limitations created by the said settlement, took any and what estate or interest in the lands and hereditaments therein comprised? And also, What estate and interest the Plaintiff, *Raleigh Trevelyan*, took in the same lands and hereditaments, under or by virtue of the limitations created by the said settlement, and as the heir at law of *Walter Trevelyan*?

This case was argued twice. By *Lawes Serjt.* for the Plaintiff, and *Bosanquet Serjt.* for the Defendant, in *Easter term*; and by *Vaughan Serjt.* for the Plaintiff, and *Onslow Serjt.* for the Defendant, in this term.

Argument for the Plaintiff. *Raleigh Trevelyan* takes the whole property as heir of *Walter Trevelyan*, till the marriage of *Raleigh*. *Walter* had an estate to him and his heirs; and having died before the marriage, while that estate was still in him, and before his subsequent estate

estate *pur autre vie* took effect, *Raleigh* was entitled as heir.

The executors of *Walter* could not take as special occupants the estate *pur autre vie*, which was limited to him as a contingent or springing use; for special occupancy can only take place where the testator has been in possession, *Holden v. Smallbrook* (a), and *Walter's* estate *pur autre vie* never took effect: and the heir is to be preferred; for a conveyance of an estate *pur autre vie* to *A.*, his heirs, executors, and assigns, will not pass the freehold to the assigns to the exclusion of the heir. *Atkinson v. Baker*. (b)

Raleigh then, as the heir of *Walter*, had in him before the marriage the same estate as his ancestor, a fee defeasible by the springing uses to arise on the marriage, with an ultimate reversion after those uses had been satisfied; as the ancestor would have had the first fee defeasible, by an estate to himself *pur autre vie*, the heir took the like estate; and when, on the marriage, the estate *pur autre vie* arose, it united with the ultimate reversion for every purpose except that of possession; for the purposes of tenure, for the purposes of estate: the whole would be described in pleading as a seisin in fee; *Stulley's case* (c); and the intervening term did not prevent this union. *Bates v. Bates* (d); *Lewis Bowles's case* (e); *Perkins*, *ut. Dower*, s. 336. *Co. Litt.* 46 b.

Argument for the Defendants. The limitation to *Walter Trevelyan* for the life of *Raleigh*, after the marriage had taken place, was a contingent springing use, — a possibility, — which passed to his executors as occupants, when the event occurred which made it vest.

The remainder in fee to *Walter*, after the uses on

(a) *Vaughan* 194.

(b) 1 *T. R.* 249.

(c) 1 *Rep.* 93.

(d) 1 *Ld. Raym.* 336.

(e) 1 *Rep.* 72.

1826.
1824
TREVELYAN
MAYHEW
TREVELYAN
MAYHEW

1824.
MAYLEVERET
MAYLEVERET
June 12.

MASON v. ROBINSON and Others.

THE following case was sent by the Vice-Chancellor for the opinion of the Court of Common Pleas:

John Dixon, late of *Richmond*, in the county of *York*, Gent., being seized in fee-simple of certain lands situate at *Lownwith*, in the parish of *Richmond*, in the county of *York*, did, in such manner as the law requires for the validity of devises of real estates, duly make and publish his last will and testament in writing, dated the 10th day of *March* 1779, and which, so far as relates to the lands at *Lownwith*, is in the words and figures following; that is to say, "I charge all my freehold messuages, lands, and hereditaments, situate at *Lownwith*, in the parish of *Richmond* aforesaid, with the payment of my just debts and funeral expences; and subject thereto, I direct that the rents and profits thereof may be applied in paying to *Margaret Dixon* and *Judith Dixon*, their respective executors, and administrators, and assigns, the interest of the principal sums of 100*l.* and 150*l.*, which are charged upon the said premises, and subject thereto in paying unto *Ann* the widow of my son, *Ralph Dixon*, late of the city of *London*, merchant, deceased, one annuity or clear yearly

Devisor directed that his rents should be applied in paying *M. D.* and *F. D.* the interest of sums charged on his freehold property; and subject thereto in paying *A. D.*, widow of his son *R.*, 1*ol.* a year till death or second marriage; that the remainder of the rents should be applied to the maintenance and education of *J. D.*, his grandson, till he was twenty-one, and if he should die before, to the maintenance

and education of his grand-daughter, *M. F. D.* That after *J. D.* and *M. F. D.* should have attained twenty-one, *W. D.*, his son, should have an annuity of 1*ol.* out of the rents, by the term of his life, subject as aforesaid: the remainder of the rents were devised to *A. D.* for the life of *W. D.*, or till her second marriage: after the death of *W. D.*, devisor gave all his lands to the use of *J. D.* and his heirs; and if *J. D.* should die before the period aforesaid without lawful issue living at his death, he gave the rents to *W. D.* for his life, subject as aforesaid; and after the death of *W. D.* the premises were to go to his children, share and share alike, and in default of such issue, to *A. D.* and her heirs. Devisor died, leaving *A. D.*, *J. D.*, *M. F. D.*, and *W. D.*—*W. D.* being his heir at law:—*A. D.* next died, intestate and unmarried; *J. D.* afterwards attained twenty-one, and died unmarried, in the lifetime of *W. D.*:

Held, that on the death of *J. D.*, *W. D.* became entitled to an estate for life in the lands.

1829.

 MARY
 P.
 ROBINSON

sum of 10*l.* till her death or second marriage, which shall first happen: the said annuity to be payable half yearly, at *Michaelmas* and *Lady-day*, the first payment thereof to begin and be made at such of those days as shall happen next after my decease, clear of all land-tax and other outgoings: and subject as aforesaid, I desire that the remainder of such rents and profits, from time to time as they shall yearly accrue and be received, and all such rents and profits from the death or second marriage of the said *Ann Dixon*, which shall first happen, may be applied for and towards the maintenance and education of my grandson *John Dixon*, son of the said *Ralph Dixon*, until he shall attain his age of twenty-one years: but in case he shall die before he attains that age, then from his death I direct that such remaining rents or profits, or the whole thereof, from the death or second marriage of the said *Ann Dixon* as aforesaid, may be applied for and towards the maintenance and education of my grand-daughter, *Margarite Faith Dixon*, the daughter of the said *Ralph Dixon* deceased, until she shall attain her age of twenty-one years; and my will is, that the receipt of the person or persons who, for the time being, shall have the care of the persons of my said grandchildren respectively shall be a sufficient discharge for the money so to be paid: and from and after my said grandchild, *John Dixon*, shall have attained his age of twenty-one years, or my said grand-daughter, *Margarite Faith Dixon*, surviving him as aforesaid, shall have attained her said age of twenty-one years, I give unto my son, *William Dixon*, out of the rents and profits of the said estate, one annuity or clear yearly sum of 20*l.* during the term of his natural life, payable half yearly, and tax-free, at *Michaelmas* and *Lady-day*: the first payment thereof to begin and be made at such of those days as shall happen next after my said grand-son, *John Dixon*, shall have attained his age of twenty-one years, or next after my said grand-daughter, *Margarite*

Margarete Faith Dixon (surviving her said brother as aforesaid), shall have attained her said age of twenty-one years: and subject thereto, I give and devise the remainder of the rents and profits of the said messuages, lands, hereditaments, and premises unto the said *Ann Dixon* yearly, during the natural life of the said *William Dixon*, or until her second marriage, which shall first happen: and from and after the death of my said son *William*, I give all and every the said messuages, lands, hereditaments, and premises (subject and charged as aforesaid) unto and to the use of my said grandson, *John Dixon*, and the heirs of his body lawfully to be begotten: but if my said grandson, *John Dixon*, shall happen to die before the period aforesaid without leaving lawful issue living at his death, then I give the rents and profits of the said premises unto my said son, *William Dixon*, for and during the term of his natural life (first deducting thereout the said annuity of 10*l.* for the said *Ann Dixon*, in case she shall then remain the widow of the said *Ralph Dixon*); and from and after the death of the said *William* then I give the said premises (subject and charged as aforesaid) unto and amongst all and every child and children of the said *William Dixon* lawfully to be begotten, share and share alike, to take as tenants in common and not as joint-tenants; and in default of such issue, I give the same and every part thereof (subject as aforesaid) unto and to the use of the said *Ann Dixon*, her heirs and assigns for ever." . . .

The testator died on the 20th day of *March* 1785, without having revoked or altered his will, leaving *Ann Dixon*, *John Dixon*, *Margarete Faith Dixon*, now the wife of *Christopher Clarkson*, and *William Dixon*, surviving him; and leaving *William Dixon* his eldest son and heir at law.

Ann Dixon died in the month of *July* in the year 1792; intestate, without having married a second time; and letters of administration of her goods and effects have

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have been granted to the Defendant, *Margarite Faith Clarkson*, by the proper ecclesiastical court.

The said *John Dixon*, the son of the said *Ann Dixon*, (who was (a) eighteen years of age at her death,) attained his age of twenty-one years, and afterwards died in the year 1803, in the lifetime of *William Dixon*, and without ever having been married.

The question for the opinion of the Court was, Whether, on the decease of the last named *John Dixon*, either *Ann Dixon* or *William Dixon* became entitled to any, and if any, to what estate in possession in the lands at *Lowwith*?

Bosanquet Serjt., on the part of the Plaintiff, who claimed under *William Dixon*, contended that on the death of *John Dixon* without issue, *William Dixon* became entitled to an estate for life in the premises under this will.

The effect of the will was to provide for the education of the testator's grand-children till they attained the age of twenty-one; then to give the rent and profits to *Ann* during the joint lives of *William* and *John*, paying 20*l.* per annum to *William*. If *John* survived *William*, *John* was to have the estate in tail, subject to an annuity of 10*l.* per annum to his mother. If *John* died childless, and *William* survived, *William* was to have the estate, subject to the same charge. The devise to *Ann* for the life of *William* being incompatible with the devise of the same property to *William*, no other mode than the above could be pointed out to give effect to the whole of the will.

Wilde Serjt. contra. *Ann* took an estate for the life of *William*, to which her executors are now entitled. The devise to her is clear, and the ambiguity is only

(a) The Court required this fact to be added.

occasioned by the subsequent devise to *William*. But a subsequent ambiguity cannot have the effect of destroying a prior clear devise. (a)

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The following certificate was afterwards sent:—

We have heard this case argued by counsel, and having considered the same, are of opinion, that on the death of the last named *John Dixon*, the said *William Dixon* became entitled to an estate for life in possession in the said lands at *Ligonwith*.

W. D. BEST.
J. A. PARK.
J. BURROUGH.
J. GASELER.

(a) *Bath's Case* 25 up note (4) *Trusts* (p) 100

FABLER and Others v. HERRING, POWLES, and Others.

June 12.

THE declaration was on a bill of exchange for 1000*l.* which was set forth in the first count as drawn in favour of *Herrera*, and *Richie*, by *Richard Exter*, in *Mexico*, dated *Jan. 31, 1825*, upon, and accepted by the Defendants. The second count stated a parol story:

Bills having been drawn on the Defendants by their agent and with their authority, in respect of a

mine which they afterwards transferred to *A.*, they requested *A.* to place funds in their hands to meet the bills when due, saying, "It would be unpleasant to have bills drawn on them paid by another party." *A.* placed funds accordingly, but when the bills were left with Defendants for acceptance, no acceptance was written on them. *A.*'s agent having complained to one of the Defendants on the subject, he said, "What I do not interfere in this business, you should see my agent for the money, and they ought to be paid;"

with their authority, in respect of a mine which they afterwards transferred to *A.*, they requested *A.* to place funds in their hands to meet the bills when due, saying, "It would be unpleasant to have bills drawn on them paid by another party."

Held, that all this amounted to a parol acceptance of the bills on which the Defendants were liable to an indorsee, between whom and *A.* there was no privity, and that the indorsee was not precluded from suing by having made a protest in ignorance of this acceptance.

with their authority, in respect of a mine which they afterwards transferred to *A.*, they requested *A.* to place funds in their hands to meet the bills when due, saying, "It would be unpleasant to have bills drawn on them paid by another party."

note

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notes signed by the Defendants, by means of *Richard Ester*, their agent. There were also the usual counts for money paid, money had and received, &c.: going to At the trial before *Best C. J.*, (London sittings) after *Easter* term, a verdict was found for the Plaintiffs, (subject to the opinion of the Court on a case which stated in substance as follows:—

The Defendants had sent out *A. F. Mornay* to Mexico as their agent, for the purpose of embarking in the exploitation of and purchasing interests in mines.

They had also sent out *Ester* as an agent to *Att. Mornay*

Payments to the extent of 50,000 dollars had been made on behalf of the Defendants, for the purpose of carrying on these mining transactions; and these payments were provided for by bills drawn by *Ester* upon the Defendants, under the direction and authority of *Mornay*, and with the consent and approbation of the Defendants.

One of these bills, the subject of the present action, was drawn, as above, by *Ester*, in favour of *Herrera* and *Richie*, by them endorsed to *Scott and Co.*, by *Scott and Co.* to *Fergusson and Co.*; and by *Fergusson and Co.* to the Plaintiffs.

Before this bill could be presented for acceptance, the Defendants had transferred to the *United Mexican Mining Association* the whole or a part of their interest in the mines in question; and the *Mexican Mining Association*, as the purchasers of these interests, would have provided for the bills drawn, as above, by *Ester* on the Defendants, but the Defendant *Poules* (agent of *Mornay*) who now acted for the *Mexican Mining Association*, that 14586 6s 8d might be placed in Defendants' hands for the purpose of taking up the bills, saying, "It would be unpleasant to have bills drawn upon their firm paid by a third party;" and adding, "that the Company might surely trust him with 10,000*l.* when he had trusted them

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them with a much larger amount. It was then agreed that he should have the money for the specific purpose of paying the bills.

Notwithstanding this, no acceptance was written on the bills when they were left at the Defendant's house for that purpose; but when *Morray* afterwards told *Herring*, one of the Defendants, that the bills were not accepted, he said, "What! not accepted? We have had the money, and they ought to be paid; but I don't interfere in this business: you should see Mr. *Powles*."

The Plaintiffs afterwards, in ignorance of these circumstances, protested the bills for non-acceptance. It also appeared that the Defendants had transmitted to *Exter* goods worth 35,000 dollars, on which goods he had received the proceeds, but refused to pay them over till he learned that his liabilities on these bills had been discharged. But though this seemed to be the reason of the Defendants' declining to write their acceptance on the bills, *Exter's* accounting for those goods formed no part of the condition on which the 11,458*l.* 6*s.* 8*d.* was placed in the Defendant's hands.

Spankie Serjt., for the Plaintiff, argued the case on three grounds: first, that there had been a parole acceptance of the bill; secondly, that, at all events, the instrument might be esteemed a promissory note; thirdly, that the Plaintiffs were entitled to recover on the count for money had and received: but as the Court confined their judgment to the first point, it is unnecessary to report the argument on the other two.

In support of the first position he argued, that, independently of words spoken, circumstances and the conduct of parties might amount to a constructive acceptance. *Wynn v. Raikes* (a); *Clarke v. Cook* (b). In neither

(a) 5 East 1520. (b) 4 East 572.

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of those cases were the circumstances and conduct of the parties so expressive as in the present, while the language used by *Herring* was of itself conclusive.

The protest having been made by the Plaintiffs, in ignorance of what had passed did not affect them.

Wilde, contra, argued that all that had passed having passed between the Defendants and strangers to the Plaintiffs no right *inde* accrued to them; and that that circumstance distinguished the present case from those which had been cited. Besides, the Plaintiffs having protested the bill for non-acceptance, were now estopped to contend that it had been accepted. *Sensat v. Matthews. (a)*

BEST C. J. We are all agreed that there has been a good acceptance of this bill, and therefore have declined entering into the point as to money had and received.

If the facts of this case are understood, it appears to me no man can doubt that both in point of justice and in point of law the Plaintiffs are entitled to recover. From *Mornay's* testimony we ascertained that he had been in *America* as the agent of the Defendants, for the purpose of exploiting a mine.

He made an arrangement with the *Mexican* company, in the course of which the present Defendants had the benefit of the money for which this action is brought. The bill, on which the Defendants are sued, was drawn by *Exter*, the sub-agent of *Mornay*, who was the agent of the Defendants. The bill, therefore, was created by the Defendants for their own benefit; they have had the advantage of it in their dealings with the *Mexican* company, and they are the persons who in point of justice ought to pay. The business on the part of the

the Plaintiffs from awarding them
(a) T. R. 184
had been supposed that it had been
Mexican

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American company being also under the management of Mornay, Pooles, one of the Defendants, applies to Mornay, and desires that he will consent to the Defendants having the money in question for the express purpose of paying these bills, complaining it would be a hardship if their bills were paid by any other house; that it would bring discredit on their house; that they who had trusted the Company ought in turn to be trusted for such a sum of money as this. Here is the most distinct promise to pay that could be made.

My Brother Wilde does not deny the promise to pay the bill, but says it is distinguishable from all similar cases in this, that it is not a promise made to one of the parties to the bill. I consider it is a promise made to one of the parties to the bill. Who is the drawer? Ester. Ester is the sub-agent of Mornay. I consider Ester and Mornay the same. There is, therefore, a promise to pay to these persons; and as was said by Mr. Justice Le Blanc, in a case that was referred to in argument, "If a man promises to pay a bill, he promises to do all the formal part."

It has been determined in a great variety of cases, that if a bill comes into a man's hands with a parol acceptance, though the party who receives the bill does not know of that parol acceptance, he has a right to avail himself of it afterwards. It is impossible for any man to doubt, on principles of common sense, that such ought to be the law; for if I take a bill I take it with every advantage the holder had before it came into my hands.

This promise being made to Mornay, and money being obtained on it, amounted to a promise upon adequate consideration to one of the contracting parties. Is there, then, any thing in the case which has prevented the Plaintiffs from availing themselves of that promise. It has been supposed that by protesting the bill for non-

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acceptance they have abandoned their claim. At the trial of this cause I put an end to that by leaving it to the consideration of the jury, whether, at the time that protest was made the Plaintiffs were aware that this acceptance had also been made. The jury expressly found that the protest was made in ignorance of what had taken place between *Mornay* and the present Defendants. If the Plaintiffs were ignorant of this, it is quite impossible that that which they have done in ignorance can prejudice any right which was before vested in them. Therefore I put the case on the principle contained in the language of Lord *Mansfield*: if a man undertakes for the substance, he undertakes for the formal parts; if he undertakes to pay the acceptance, he undertakes to accept. The Plaintiffs in this case have done nothing to waive their right on that acceptance; and it would be an opprobrium to the law of *England*, if, upon a bill drawn by an agent of these gentlemen, and of which they have had the advantage, they could turn round and say, Our agent in *America* is a person not to be trusted; we will not pay the bill, though we have received money for the purpose. I should be exceedingly sorry if the Plaintiffs could be so turned round. I am happy to find in this case that which I find in most others where statutes have not interfered; that the common law will enable us to do justice.

PARK J. Being clearly of opinion, as I believe we all are, that this is an acceptance, it does not seem necessary to discuss the point whether an action for money had and received would lie.

In the case of *Powell v. Monnier* (a), which was decided by Lord *Hardwicke*, it was held that much less than this amounted to an acceptance. But the strong

(a) 1 Atk. 611.

case on the subject is *Wynne v. Raikes*: the question in which was, whether the terms of a letter amounted to an acceptance, and the Court said a promise to accept amounts to an acceptance.

In *Rees v. Warwick (a)*, indeed, a man sent a bill to another who returned it, saying, "Your bill shall have attention;" that was held not to be an acceptance. But when a man undertakes to accept or pay the bill, it is much stronger than saying, "The bill shall have attention." That appears to have been the opinion of Mr. Justice *Bayley*, who tried the cause. Lord C. J. *Abbott* says, "The phrase 'have attention' is at least ambiguous: it may mean, that the Defendants would have an examination and enquiry into the state of the account between them, to ascertain if they would accept the bill;" but he says, "I will not break in on the authority of the two cases," which are those I have mentioned of *Powell v. Monnier*, and *Wynne v. Raikes*.

If what passed in the present case be not held to be an acceptance, it is a downright fraud on the Plaintiffs. What is the arrangement made? *Mornay* as the Defendant's agent employed *Ester* to draw bills, and afterwards consented to money's being placed in the hands of the Defendants by the company, to the amount of 11,400*l.* for the express purpose of paying those bills.

It has been contended, indeed, that the undertaking to accept is not available unless made to a person who has a concern in the bill. But in this transaction *Ester*, the drawer of the bill, and *Mornay*, stand in effect in the same situation. Can it be allowed to the Defendants, after they have got 11,000*l.* in their own pockets for the express purpose, to elude paying these bills?

I am clearly of opinion that this is such an acceptance as will bind the parties, and under all the

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(a) 2 B. & A. 113.

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circumstances, I think the Plaintiffs are entitled to our judgment.

BURROUGH J. The argument on the part of the Defendants would be very good if this rested merely on a promise; but this promise is an acceptance, and an acceptance for the benefit of every body whose name is on the bill.

It has been decidedly laid down, that a promise to pay a bill is an acceptance. No man can doubt that there was a promise arising out of this transaction, and the fact of this being an acceptance is fortified by what occurred when the bill was left. If the Defendants did not mean to accept the bill, why did they not refuse? Their not having done so, is a strong confirmation that they entered into a legal obligation to pay the bill.

GASELEE J. This case having been so fully gone into, it is unnecessary for me to say more, than that I concur with my Lord C. J. and brothers, that this is an acceptance of the bill. It is contended that the condition of things is changed by the Plaintiff's having protested the bill. If any ill consequences have arisen to the Defendants by reason of this protest, it is their own fault for not having accepted it in form, when they were bound to do when it was presented, in consequence of the undertaking which passed between them and *Morhay*.

Rule discharged.

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circumstances I think the Plaintiff is entitled to a judgment.

Wilson v. Powis.

THE Plaintiff declared, that in consideration of his having delivered the Defendant a watch to clean and repair, for certain reward to be therefore paid, the Defendant undertook to clean, repair, and take care of the watch, and to deliver it back to the Plaintiff on payment of the stipulated reward.

Declaration, that in consideration Plaintiff had delivered to Defendant a watch to repair, Defendant undertook to repair and redeliver it to the Plaintiff:

Breach, that the Defendant did not take care of, or redeliver the watch.

Breach; non-delivery: Evidence; that Defendant repaired and tendered the watch to Plaintiff, who said, "Take it to my uncle in *Margaret Street*, and he will pay for it."

At the trial before *Best C. J. Middlesex*, sittings after *Easter* term, it appeared that the watch was repaired and tendered to the Plaintiff, who said, "Take it to my uncle in *Margaret Street*, and he will pay for it."

The Defendant not finding the uncle in *Margaret Street*, or acting under some misapprehension upon hearing he had moved, delivered the watch to another uncle of the Plaintiff, in *Golden Lane*, who lost it. A verdict having been found for the Plaintiff.

Held, no variance.

Wilde Serjt. moved for a rule nisi to set it aside, and enter a nonsuit, on the ground that the Defendant having repaired and offered to redeliver the watch, and the Plaintiff having refused to receive it, the contract to redeliver to the Plaintiff was discharged. That the action ought to have been brought, if at all, on a new contract to deliver to Plaintiff's uncle in *Margaret Street*, and that, therefore, there was a variance between the contract declared on and that established in proof. The rule was granted, and now, after hearing *Wilde* in support of it,

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MOHAW

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Pleading several Matters.

UPON a motion by *Adams Serjt.*, calling on a defendant to elect which of several inconsistent pleas he would abide by, in an action on an award; the motion being arranged by consent of parties, the Court gave out,

Several pleading. Inconsistent pleas not allowed except under an affidavit of their necessity.

That for the future, inconsistent pleas should not be allowed, unless accompanied with an affidavit to show that they were necessary to the justice of the cause.

FLETCHER v. GILLESPIE and Others.

ACTION on a charter-party, under which the Plaintiff's ship was to proceed to *Quebec*, or so near thereto as she might safely get, and there load from the factors of the Defendants a complete cargo of seals; the cargo to be sent alongside the ship at the merchant's expence; the captain rendering the usual and customary assistance with his boats and crew.

The Defendants had executed a charter party, under which the cargo was to be sent alongside the ship at the merchant's expence, the captain rendering the usual and customary assistance

Breach, non-payment of the stipulated freight.

There were also counts for work and labour, money paid, &c.

Some of the cargo lying about thirty yards from the edge of the wharf, the captain applied to the Defendant's factor for labourers to remove it into the boats: The factor having refused, saying he would abide by the charter-party, the captain hired labourers for the purpose:

Held, that the expence so incurred might, notwithstanding the charter-party, be recovered on counts for money paid, and work and labour.

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At the trial, before *Best C. J.*, *London* sittings after *Easter* term, it appeared, among other things, that some part of the cargo lying about twenty or thirty yards from the edge of the wharf at *Quebec*; the captain of the vessel applied to the Defendant's factor for people to get it afloat; the factor refused to provide them, saying, he would abide by the charter-party; whereupon the captain employed labourers, to whom he paid *5l. 14s.*, to bring this part of the cargo to the side of the wharf, whence the crew assisted in getting it on board.

It was objected at the trial, that payments of this nature, having been provided for by the charter-party, under the words "the cargo to be sent alongside the ship at the merchant's expence," the Plaintiff could not resort to the Defendant's general and implied liability under the common counts, for what he had a right to claim of them under their specific contract; and the count on the charter-party containing no breach for the non-payment of the expences for getting the cargo on board, the Defendants were to that extent entitled to a verdict.

It was left to the jury to consider whether, upon the factor's saying he would abide by the charter-party, the money for labourers was not paid to the use of the Defendants, under an implied promise from the factor, that it should be repaid if the Defendants were liable. Whereupon a verdict was given for the Plaintiff, this point being reserved for the consideration of the Court.

Wilde Serjt. accordingly obtained a rule *nisi* to set aside the verdict and enter a nonsuit; against which

Vaughan and *Bosanquet* Serjts. showed cause, contending, that even if the Plaintiff might have recovered this sum under the charter-party, he had a concurrent remedy on the new implied promise made by the factor,

White

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APPEAL

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SCALES v. JACOB.

Where, to a plea of the statute of limitations, the Plaintiff replies a promise within six years, and proves a promise to pay *when of ability*, made three years after the original cause of action accrued, and within six years of the commencement of the action :

Held, he must also prove the Defendant's ability.

Burroughs J. and *Park* J. *dissentientibus*.

ASSUMPSIT for butcher's meat. Pleas, general issue and the statute of limitations, to which the Plaintiff replied a promise within six years.

At the *London* sittings in *Easter* term, before *Best* C. J. it appeared, that the meat was delivered in 1817, or 1818, and that about three years afterwards, the Defendant being called on for payment, said, it was not in his power to pay, but as soon as it was, he would.

The Plaintiff not proving the Defendant to be able to pay, the Chief Justice directed a nonsuit, with leave to move to enter a verdict.

Vaughan Serjt. having accordingly obtained a rule nisi,

Adams Serjt. now showed cause. The promise is clearly conditional, and if it had been made more than six years after the debt was due, there can be no doubt that the Defendant's ability to pay must have been proved; *Cole v. Sarby* (a), *Davis v. Smith* (b), *Besford v. Saunders* (c), *Hyleing v. Hastings* (d). Here, however, the words were spoken within the six years, when, it will be contended, no new promise was necessary to give the Plaintiff a right of action; nor was it necessary then; but after the six years, the Plaintiff, relying solely on this acknowledgment for the support of his action, must take it as it was made, accompanied with the con-

(a) 3 *Exp. N. P. C.* 159.

(b) 4 *Exp. N. P. C.* 36.

(c) 2 *HL Bl.* 1166.

(d) 1 *Ld. Raym.* 389.

dition ;

dition; for the doctrine that from a mere acknowledgment an absolute promise to pay may be implied is now in effect overruled in *A Court v. Cross* (a), and rests on a series of cases, *Yea v. Fourakin* (b), *Trueman v. Fenton* (c), *Brian v. Horseman* (d), which have no foundation on the statute, or the earlier decisions, where, as in *Hyleing v. Hastings*, an acknowledgment of the debt was, at farthest, considered to be no more than evidence from which a jury might perhaps infer a promise, but from which the Court would not imply one.

In *Dickson v. Thompson* (e) and *Bland v. Haselrig* (f), it was thought that even an express promise would not revive the debt, or give a new right of action; and in *Leaper v. Tatton* (g) and *Hellings v. Shaw* (h), it is clear that the judges have wished to return to the strict construction of the statute.

Vaughan Serjt. in support of the rule. Upon the acknowledgment of the debt, the condition attached to it may be laid out of the question; for a promise in law may be implied from the acknowledgment: *Mountstephen v. Brooke* (i), *Pittam v. Forster* (k), *Frost v. Bengough*. (l) But even though an express promise should be deemed necessary to give a cause of action after the expiration of the six years, when the original cause of action is at an end, such a promise cannot be necessary upon an acknowledgment within the six years, while the original cause is still subsisting.

Within the six years the Defendant could attach no conditions to his general liability; and if the Plaintiff

- (a) 3 Bingh. 329.
- (b) 2 Burr. 1099.
- (c) Cowp. 544.
- (d) 4 East, 599.
- (e) 2 Sess. 336.
- (f) 2 Vent. 151.

- (g) 16 East, 420.
- (h) 7 Taunt. 608.
- (i) 3 B. & A. 141.
- (k) 1 B. & C. 248.
- (l) 1 B. & C. 266.

had

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had sued the day after the acknowledgment, he might have recovered upon proof of the acknowledgment, in spite of the condition with which it was accompanied; If, then, he could have recovered the day after upon proof of the acknowledgment, why should not the acknowledgment avail him at any time within six years after it was made?

Cur. adv. vult

GASHIER, J. I am of opinion that the nonsuit in this case was proper. It is not necessary for me at present to investigate any supposed difference between a promise and an acknowledgment, because it has nowhere been maintained that an acknowledgment of a debt, is *quod* acknowledgment, sufficient to revive the debt, but only a circumstance from which perhaps a new promise may be implied. In *Hyleing v. Hastings* (a), according to almost all the reports of the case, the Court considered the acknowledgment as evidence only of a new promise.

The language of the statute is, "that all actions upon the case, other than for slander, shall be commenced and sued within six years next after the cause of such actions, and not after."

With respect to every species of action except assumpsit it has been holden that the plaintiff must show he has commenced his action within the time prescribed by the statute, and that it is not incumbent on the Defendant to plead that the limited period has elapsed. It is not easy to say why a different rule has obtained in assumpsit; but it is now too late to say that a defendant can take advantage of the statute without pleading it. (2 *Wms. Saunders*, 65 b, c. note.) In *Hyleing v. Hastings*, indeed, the Court held that the new promise might

(a) 1 *Ld. Raym.* 389. (*Cartb.* 470. *Salk.* 29. *119 Med.* 223. *Hutt.* 427. *Comm. Rep.* 540.)

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 of
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be considered a revival of the old one; but upon con- sideration of that case, and consultation with all the judges, it was held in *Dean v. Crane* (a), upon a plea of *non assumpsit infra sex annos*, that a promise made by defendant after arrest did not support a declaration on a note made by the defendant in favour of the plaintiff's testator above six years before the action brought.

So in *Hickman v. Walker* (b) it was decided, that where the defendant pleaded *non assumpsit infra sex annos*, in an action brought by an executor on promises to the testator, and the plaintiff replied a subsequent promise to himself, the replication was a departure, and the Chief Justice said, "We are of opinion that the replication is not good, for the time of limitations must be computed from the time when the action first accrued to the testator, and not from the time of proving the will. The proving of the will gave no new cause of action, and therefore the time of proving the will is perfectly immaterial."

This case, therefore, confirms that of *Dean v. Crane*, and the point seems to have been admitted in the executors of the *Duke of Marlborough v. Wadmore* (c), where the plaintiffs having declared as executors on a promise to their testator, and issue having been joined on the plea of the statute of limitations, the Plaintiffs moved to amend by laying the promise to have been made to themselves. In *Sarol v. Wine* (d), also, it was decided that an acknowledgment made by the defend- ant, after the death of the plaintiff's intestate, of a debt due above six years to the plaintiff's intestate, would not support a count by the administrator laying the promise to have been made to his intestate. *John Kiegl*

(a) 6 Mod 309. (b) 4 Wils 27. (c) 2 Str 498. (d) 3 Baitm 174.

1820.

SARLES

vs.

JACOB.

v. *Norris* (a) (where the assignees of an insolvent debtor sued the defendant for a debt due to the insolvent more than six years before they sued out their writ, it was held, that in order to support the action, they must shew an express promise to themselves. ... On the same principle, in *Pittam v. Foster*, (where an action was brought against *Foster*, and *Norris* and wife, upon a joint promissory note made by *Foster* and *Norris's* wife before marriage, and the promise was laid by *Foster* and *Norris's* wife before marriage, and issue was joined upon a plea of the statute of limitations,) *Abbott C. J.* says, "The question is, whether an acknowledgment made within six years operates as a new substantive promise, or draws down the original to the time when the acknowledgment is made. In *Hurst v. Parker* (b) Lord *Ellenborough* says, that in actions of assumpsit an acknowledgment of the debt is evidence of a fresh promise. If that be not so, but on the contrary the acknowledgment is to have the effect of drawing down the original promise, then in an action by an executor, upon promises made to the testator, evidence of a promise made to the executor would support the issue. But the reverse of this proposition was decided in *Grant v. Grant* (c). That was an action of assumpsit, by an executor upon promises to the testator. Defendant pleaded *non assumpsit infra sex annos*, and upon evidence it appeared, that after the death of the testator, and after six years from the time of the contract, Defendant acknowledged the debt to the executor, and promised to pay it. *Holt C. J.* delivered the resolution of the Court, and said, that they were all of opinion that the action could not be maintained, the promise being made to the executor, and so out of the issue. That case was followed by several others of the same

(a) 2 H. Bl. 561. (b) 2 B. & C. 179. (c) 2 Ld. Raym. 1101.

kind, which it is unnecessary to mention. The last was in the Court of Common Pleas; *Ward v. Hunter* (a); that was an action by an executrix on promises made to the testator; plea, statute of limitations. Plaintiff relied upon the defendant's having said to her, that the testator always promised not to distress him for the money. The plaintiff having obtained a verdict, a motion was made to enter a nonsuit; and the Court said, when the courts determined that an acknowledgment is evidence of a new promise then made, it must be a promise made by a person competent to make it, and by a person who is in existence to receive it; and the rule for a nonsuit was made absolute. That case was determined at a time when Lord C. J. Gibbs presided in the Common Pleas, than whom no judge was ever more perfectly acquainted with the rules of pleading.

1826.
 SHERIFF
 vs
 JACOB.

It is not necessary to cite more decisions to shew, that a promise made under such circumstances as those of the present case is a new promise, and not a revival of the old one, and must be correctly declared on according to fact; for the same reason that a promise made to an executor will not support a declaration on a promise made to the testator. Although the cases to which I have referred are not exactly the same as the present in point of fact, they are the same in principle; a new promise by a debtor to pay when of ability is not the same as a promise to pay when requested, and will not support a declaration stating a promise to pay when requested. There are many cases which shew, that such a conditional promise cannot be given in evidence under a count on an absolute promise. In *Cole v. Sanby*, where to a plea of infancy the plaintiff replied a promise after full age, and the evidence was of a promise to pay when of ability, Lord Kenyon said, "This is not an absolute promise

(a) 6 Term 216.

1886

SCALES
v.
JACOB.

to pay, & it is, 'when he is able.' Remember a case before Lord Mansfield, in *Staffordshire*, in which he was of opinion that it was incumbent on the Plaintiff to show that the Defendant was of ability to pay at the time of the action brought." In *Davis v. Smith*, Lord Kenyon ruled the same way again, and added, that it had been so ruled before by Lord C. J. Byre. So in *Bayford v. Saunders*, where a bankrupt after obtaining his certificate promised to pay a prior debt when he should be able, upon a general indictment brought upon that promise, it was holden, that the Plaintiff must prove the ability of the Defendant to pay.

In *Thompson v. Osborne (a)*, indeed, where Lord Ellenborough held that a promise to pay a debt by instalments, if time should be given, took the case out of the statute, and in *Gregory v. Parker (b)*, where there was a letter of the defendant's wife acknowledging the debt, it was taken for granted, without advertence to any of the decisions, that an acknowledgment of a debt was the same as a promise; but that principle has been expressly denied in *A Court v. Cross*.

I am of opinion, therefore, that this was a conditional promise, and ought to be proceeded on as such.

As to the distinction which has been attempted to be made between a promise given before the expiration of the six years and a promise after, I think it not tenable.

It has been argued, that before the expiration of the six years, the statute does not apply, and that a defendant has within that time no right to add terms to the original contract. Undoubtedly within the six years the plaintiff may go on his original contract, notwithstanding any subsequent promise; but here the original

(a) 2 Stark. N. P. C. 98.

(b) 1 Camp. 394.

TRINITY

1828
SCALES
JACOB

because of action had expired before the action was brought. The Defendant by a subsequent promise that upon certain terms extended the duration of his liability; and if the Plaintiff will after six years avail himself of that promise, he must take it as it was given. Though formerly an opinion prevailed that it was unfair to take advantage of the statute, unless where the debt had been paid, the courts have lately been of opinion that the operation of the statute is in all cases extremely salutary; and I shall, therefore, conclude in the words of *Serjeant Williams* (a): "After all, it might, perhaps, have been as well if the letter of the statute had been strictly adhered to: it is an extremely beneficial law, on which, as it has been observed, the security of all men depends, and is, therefore, to be favoured. And although it will now and then prevent a man from recovering an honest debt, yet it is his own fault that he postponed his action so long; besides which, the permitting the evidence of promises and acknowledgments within the six years seems to be a dangerous inlet to perjury."

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BURROUGH J. The facts in this case seem to me to remove all doubt. They are, that the Defendant being applied to for payment for meat about three years after it was furnished, said that it was not in his power to pay, but that as soon as it was, he would; and within six years after this promise the Defendant is sued, though more than six years from the delivery of the meat.

This is said to be a conditional acknowledgment, although made at a time when the debt was still alive, and all the parties in the same situation as when it was originally contracted. Suppose, the day after this promise was made, an action had been brought on an account

(a) 2 *Wms. Saund.* 64 b. note.

1826:

SCALES

JACOB.

stated, would not this acknowledgment have been sufficient evidence to sustain the action? and would not that action have lain to the end of six years after the acknowledgment? What, then, becomes of this as a conditional acknowledgment? In the cases which have been referred to, the old liability had expired, and the new promise was to be taken accompanied with its conditions; but in the present case, at the time of the acknowledgment, the debt was an available claim, and the Defendant only says in effect, "I owe the money, but cannot pay."

Even on the issue of *non assumpsit infra sex annos*, I am of opinion this action might be supported. The acknowledgment which has been made within six years keeps the debt alive, according to all the cases, and is very different from an acknowledgment or promise made after the expiration of that time; such a promise creates a new obligation, and must, therefore, be taken, if at all, with all its qualifications.

In *Hyleing v. Hastings* (a), Holt C. J. said, "There is a difference where the six years are expired before the making of such conditional promise, and where they are not; because the contract not being barred by the statute has no need of so much assistance to continue it, as it must have to revive it if it be once absolutely destroyed." According to this distinction the original contract in *Cole v. Saxby* being invalidated or destroyed by infancy, the promise made after age was a new contract, and to be taken with all its new qualifications. In *Davis v. Smith*, the new promise was more than six years after the original contract, and being clearly conditional ought to have been treated as such. But there seems to be a solid and recognised distinction between an acknowledgment made before the expiration of the six years, and an acknowledgment after.

(a) *Ld. Raym.* 389.

As to the supposed necessity for a promise, instead of or as well as a mere acknowledgment, it should seem not to be necessary in this case, from the circumstance that an action of debt would have lain to recover the price of the goods sold and delivered, and that a bare acknowledgment of the contract would have been sufficient to support such an action. In such a form of action a promise is unnecessary, and it is only necessary in assumpsit to make a formal allegation of it on the pleadings.

1831
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For these reasons I think the Plaintiff entitled to a verdict.

PARK J. It has been truly observed that the conflicting decisions to be found in our reports upon the statute of limitations reflect no particular credit upon *Westminster Hall*; and I am very glad that the courts of law seem inclined, as far as possible, to retrace their steps, and to get back to the plain construction of the statute. Having that view myself I was happy to concur with the other Judges in this Court in *Michaelmas* term, in the case of *A'Court v. Cross*, in endeavouring to assist in so desirable an object.

In what I am about to say very shortly upon the case at bar, I do not consider myself as trenching, at least I am sure I do not mean to trench, upon that decision. Indeed, in delivering my opinion here against the Defendant, I do not trouble myself with any of the cases that have heretofore been decided one way or the other, for this case depends upon its own peculiar circumstances, and particularly upon the time when the promise was made. If, however, contrary to my intention, another case is added to the number of inconsistencies already crowding our books upon this subject, it will render the duty more imperious, whenever a case of sufficient value occurs, to have all these matters put upon record, that we may have

1826.
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VI. OED. TO ACRY. 1817. 1818. 1819. 1820. 1821

one rule of sound judgment from the highest courts of
 error upon this frequently occurring subject, and
 The facts of this case are in a few words: to his
 adjourn for butcher's meat, there is a plea of the general
 issue and also one of the statute of limitations. The
 meat was delivered in 1817 or 1818, and (if nothing
 more could be stated) the statute of limitations had
 clearly run upon the demand; but within two or three
 years (and certainly within six years) from the delivery
 of the meat, the Defendant, said *it was not in his power to
 pay for it, as soon as it was, he would*. Here is a promise;
 but I admit it is a conditional one; and I admit, also,
 that if the statute had run, that is, six years had
 expired before that promise (being a conditional one)
 was made, the debt only would have revived upon proof
 being adduced of the Defendant's ability to pay. *Devin*
v. Smith. But here that promise to pay was made
 before the statute had run, at a time when the De-
 fendant had no right, as I think, to annex a condition;
 at least the condition so annexed could be of no avail
 during the six years; for I take it to be quite clear that
 notwithstanding the Defendant chose to clog his promise
 with a condition, the Plaintiff might have sued him at
 any time within six years, and, without going into the
 original consideration of the goods sold and delivered,
 might have recovered upon proof of this conditional
 promise. This I am sure is every day's practice in
Nisi Prius in undefended causes, where the proof is
 "I wish to pay, and I will if I am overable," or other
 words to the same effect; and yet the plaintiff recovers
 without proving the defendant's ability. For illustration:
 suppose a man has given a promissory note, payable in
 two months, and has not paid at the end of that time;
 but, in about a year, pays interest, which is indented
 upon the note by consent of both parties: I will sup-
 pose the same proceeding takes place in the second,
 third,

IN THE SEVENTH YEAR OF GEO. IV.

To a note indorsed by me, but before I am now
 third, fourth, and fifth years. It takes it for granted it
 will be admitted to me; that an action brought at any
 time within six years from the last indorsement, though
 perhaps ten years after the date of the original note,
 would not be barred. This is also exactly the case of
 mutual accounts between the parties, where every new
 item and credit in the account given by the one party
 to the other is an admission of their being some time
 settled account between them, the amount of which is
 to be afterwards ascertained, and any act which the
 jury may consider as an acknowledgment of its being
 an open account is sufficient to take it out of the sta-
 tute, and in *Cranch v. Kirkman (a)* the exception in
 the statute as to merchant's accounts was held not to be
 confined to persons of that description.

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But the case I have hitherto put as to the in-
 dorsement on a note, I admit has been upon a mere
 payment of interest, without any condition annexed.
 It does not seem to me, however, that if every year
 when those payments were respectively made, there
 were added to the indorsement the words, "Next year
 I will pay principal and interest if I am able," any
 difference in law exists between the cases. There is the
 promise to pay that, which by law he was at that time
 bound to pay; and the condition annexed, as it would
 not prevent the immediate enforcement of the demand
 within the six years, ought not to affect a cleat ac-
 knowledgment of the debt, with a promise tacked to it,
 although done with a condition; which at the time
 the condition was added the party had no right to
 impose. Therefore the presumption raised by the sta-
 tute from lapse of time is here rebutted by a promise
 to pay before the six years had expired; and though
 -que sine I esting piod is insensu qd non ad no e
 (bucos and in south (a) - Peake, 211.

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there was a condition annexed, it is a clear recognition that the debt was not satisfied nor paid when the conditional promise was made.

The nearest case to this that I have found is *Thompson v. Osborne*, where Lord *Ellenborough* held that a promise to pay a debt by instalments, if time should be given, took the case out of the statute, and this even after the statute had run.

Except the last case, it will be observed, that I have not troubled the Court with quoting cases; for, having looked at many, I thought it would be an idle parade and a great waste of time, to run through a head-roll when not one of the cases has the distinguishing feature of the present case, upon which I rely, a promise, though burdened with a condition, within that period when the promise might avail the Plaintiff, though the condition could work him no injury, nor postpone or delay his immediate remedy. I wish it to be understood fully that I strongly rely upon a promise accompanying the acknowledgment. I am not arrogant, or presumptuous enough, especially as my Brother *Gaselee* has already expressed his opinion to be in favour of the Defendant, and I am also to be encountered by that of the Chief Justice, to suppose that I am right; but under my present conscientious, and not hasty, impression, I think this nonsuit ought to be set aside: however, as the Court are equally divided, of course it cannot be disturbed.

BEST C. J. I entirely concur in the judgment which has been delivered by my Brother *Gaselee*, and therefore do not think it necessary to go again through all the cases. The two best statutes in our books are the statute of frauds and the statute of limitations; but, unfortunately, the Judges in *Westminster-Hall* have taken a different view of the subject; and, until recently, a struggle

struggle seems to have been made to avoid the effect of these statutes.

It is curious to observe the progress of opinion on this subject. At first, it seems, the Judges were with the statutes; and in *Dickson v. Thompson* (a), *Scroggs J.* and the Bar on both sides were agreed, that there must be an express promise to take a case out of it. The same point was ruled in *Bass v. Smith* (b); and in *Lacon v. Briggs* (c) it was still held there must be a promise; although the Court considered it somewhat hard. Then in *Hyleing v. Hastings*, by the opinions of ten Judges, after much consultation, it was determined, that an acknowledgment of the debt was at the utmost only evidence from which a promise to pay might be inferred by a jury; but that if a jury found only the bare acknowledgment it would not be sufficient. After this, equity lawyers came into the courts of common law. Lord *Mansfield* brought with him into those courts equitable notions of the statute of limitations; and held that a bare acknowledgment of a debt, even after action brought, would be sufficient to support the action, although not commenced till after the expiration of the six years. Lord *Loughborough* entertained the same opinion. The Court of King's Bench adhered to it, till ultimately the principle was carried to such a degree of absurdity, that a declaration of a defendant that he would not pay (d) was holden a sufficient acknowledgment to take the case out of the statute.

The Court of Common Pleas at length came to a different opinion in *Hellings v. Shaw*; and *Gibbs C. J.* there puts three cases, in which it had been holden that the statute did not protect a defendant. One, where the defendant has admitted that the debt is unpaid, but

(a) 2 *Shoq.* 126. (d) *Douthwaite v. Tibbot,*
 (b) 12 *Vin. Abr.* 229. 5 *M. & S.* 75.
 (c) 3 *Atk.* 105.

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has stated that it was discharged by lapse of time; and others, where the defendant has stated that it is discharged by particular means, to which the plaintiff precisely referred himself; if the Plaintiff has disputed that, he sets himself in to recover; in this case only where the defendant challenges the plaintiff to produce a particular mode of proof of his liability; if the plaintiff produces that proof, the Courts have said the defendant shall not be discharged. All the decisions on this subject were under review in the case of *M. Co. vs. C. Co.* and with all the considerations I have given this matter, I am still of opinion, that every word I am reported to have uttered in that case is warranted by prior decisions.

Having disposed of the cases, I come next to the statute. If the language of that is clear, we are especially bound to adhere to it where there is no conflict among the decisions; and the language of this statute is so clear, that if it were not for the decisions at doubt would hardly be raised upon it. It has been argued, that the object of the statute was to protect those who had lost the evidences of their payments. This I deny. The title of the act is proof to the contrary, *iff* An act for limitation of actions, and for avoiding suits in law; and the preamble is, "For quieting men's estates, and avoiding of suits." After appointing various periods of limitation for other actions, the act provides that all actions upon the case, other than for specialties, shall be commenced and sued within six years next after the cause of such actions, and not after. But it has been argued, that by an acknowledgment after the six years, a new cause of action is created, from which all promise may be implied. Yet in ejections and the other *actions* of action, besides *assumpsit*, enumerated in the statute, no acknowledgment after the allotted time will create a new cause of action, although the statute was passed on the

same

same principles with respect to those actions (as with respect to assumpsit). It is not a statute to protect parties against loss of evidence; but to quiet claims. The plea is defendant when he has slept six years over his right; and when time and misfortune may have disabled the debtor from discharging his obligations, as is not once iniquitous and anti-christian.

The Plaintiff then in this suit has no cause of action after the expiration of the six years. Before the expiration of the six years, it is true a conditional promise was made; but that, if relied on, must be taken subject to the condition.

In none of the cases has any distinction been made as to the time of the promise, whether before or after the six years; but it is clear, that after the six years the Plaintiff has no cause of action except on the new promise; and that being conditional, the condition attached to it must be observed. The new promise does not bring down the old cause of action; but creates a new one; the form of the pleadings sufficiently indicates this for the Defendant, by his replication to the plea of *non assumpsit infra sex annos*, admits that the plea is a bar to the original demand; and relies upon a subsequent promise; and there is abundant authority to show, that if the subsequent promise be conditional, it cannot be treated as absolute.

Cole v. Saddy and *Davis v. Smith* are conclusive on this point; and though I should not be disposed to pay much attention to a single *nisi prius* decision, yet when a series of these decisions show the the practice at *nisi prius*, they are entitled to consideration. Lord Kenyon has laid down the rule in *two* cases, that where a party promises to pay when of ability, the plaintiff cannot succeed unless he shows ability. *Esch v. C. B.* ruled the same; and *Heath v. J.* was accustomed to the rule so within my own recollection.

The decisions of these eminent Judges have remained untouched:

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untouched: and the circumstance that the promise might have been made after the expiration of the six years was never adverted to before them, because it was deemed immaterial. I think it immaterial, for the reasons I have before stated, and that, therefore, the nonsuit in the present case ought not to be set aside.

The Court being equally divided, the nonsuit was allowed to stand, and the rule for setting it aside was Discharged.

RECORDED IN THE COURT OF COMMONS

END OF TRINITY TERM.

Having been called on to show cause why the nonsuit should not be set aside, the defendant has shown cause, and the court has refused to set it aside.

The court has also refused to set aside the nonsuit in the present case, because it was deemed immaterial.

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I N D E X

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CONTAINED IN THIS VOLUME.

ACTION ON THE CASE.

(For Malicious Suit.)

An action may be brought to recover damages for a malicious suit, even where such suit is terminated by rule of court, and the rule is evidence of the termination of the suit. *Brook v. Carpenter.* Page 297

ACTION. (Parties.)

See **AWARD, 1. ASSUMPSIT, 2. JOINDER IN ACTION.**

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AFFIDAVIT TO HOLD TO BAIL.

See **PRACTICE, 4.**

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See **RECOVERY, 3.**

Where a general verdict was given on a declaration, some of the counts of which were bad, the Court amended the *postea*, by entering up judgment on a single count, after argument in error, in *K. B. Richardson v. Mellish.* Page 334

ANNUITY.

1. The Court set aside an annuity where 910*l.*, the consideration money, was paid to the grantor, who immediately returned it all but 1*l.* to pay off preceding annuities, and 165*l.* which the attorney, who negotiated the affair, retained for his trouble. *Henry v. Taylor.* 177

2. A me-

2. As a memorial of an annuity deed, enrolled within thirty days after execution of the deed by the grantee, is good, though enrolled before execution by the grantor. If the witnesses to the deed are accurately described in the memorial, it is sufficient, though they did not see the parties execute it. *Wright v. Bamberidge*. Page 315

ARBITRATION.

One of several partners cannot bind the others by a submission to arbitration, even of matters arising out of the business of the firm. *Stead and Others v. Sill*. 101

ASSUMPSIT.

See BASTARDY, I. VESTRYMEN.

1. *J. T.* and *B.* were jointly concerned in the sale of butters. *J.* consigned them to *B.*, who sold them on the joint account.

T., being requested to accept bills for the firm, refused to do so without some security, when *B.* engaged, if *T.* paid the bills, to repay him out of the proceeds received for butters already sold.

T. having accepted and paid the bills: Held, that he might sue *B.* for money had and received to his use. *Coffee v. Brian*. 54

2. Goods were consigned to *L. C.* or their assigns, or they paying freights for the same. *Grand Co.* indorsed the bill of lading to *K.* their broker, and then became bankrupt; the ship-

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owner, in ignorance of these circumstances, applied to *J. A.* and *Co.* for the freight, and they sued *K.* for it.

Held, that *K.* was liable. *Dougall v. Kemble and Another*. Page 388

3. The Defendants had executed a charter-party, under which the cargo was to be sent alongside the ship, at the merchant's expense, the captain rendering the usual and customary assistance with his boats' crew, some of the cargo lying about thirty yards from the edge of the wharf, the captain applied to the defendants' factor for labourers to remove it into the boats. The factor having refused, saying he would abide by the charter-party, the captain hired labourers for the purpose.

Held, that the expense incurred might, notwithstanding the charter-party, be recovered on counts for money paid, and work and labour. *Fletcher v. Gillespie and Others*. 635

ATTACHMENT.

See AWARD, 8-2.

ATTORNEY.

- 1. An attorney who stays proceedings upon an undertaking to pay costs, is bound to fulfil his engagement, although he dies before bail is put in. *Wright v. Jones*.
- 2. Where an attorney, without regular authority from the Plaintiff,

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tiff, commenced an action of replevin, and the Plaintiff, knowing of the proceedings, suffered the house to be carried down to trial, but afterwards, concerting with the Defendant, entered up satisfaction on the record, without securing the attorney his costs, the Court refused to vacate the entry of satisfaction. *Abbott v. Rice*.

3. The attorney for the Plaintiff having acted on both sides, attending the parties, and preventing an interview, the Court set aside the proceedings, and made the attorney pay costs. *Berry v. Jenkins*.

AUCTION.

The vendor of a horse stationed his servants to join in the bidding at a public auction, and the servant bid up to 23l. after a bond-fide bidder had bid 12l.

Held, that the sale could not be enforced against a subsequent bidder. *Crocker v. Austin*.

AUTHORITY.

See AWARD, 1. ATTORNEY, 2.

AWARD.

See ARBITRATION.

1. Declaration, that a cause being depending in Chancery between M. D. and his two infants, Plaintiffs, and T. B. since deceased, and J. H. Defendants, it was ordered, with the consent of the attorney of the parties in the suit, that the matters in question of the suit, and all disputes between M. D. and T. B. should be

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be referred to the arbitrament of J. H. C. who was to claim for the more debts, and in case either of the parties should object, the arbitrator was not to oblige the party, but that afterwards he should be bound to follow the award of the arbitrator, and that the executor, as aforesaid, should pay Plaintiff about of T. B.'s assets, and that being so liable, the Defendant, executor as aforesaid, promised to pay:

Held, on demurrer, that the action lay against the executor; that the promise sufficiently appeared to have been made in his representative capacity, that a sufficient authority to refer was shown, and a sufficient award to enable Plaintiff to sue; and that the authority was not revoked by the death of T. B. *Douse v. Coxe and Another*.

2. Corruption in the arbitrator is no answer to a motion for an attachment for non-performance of an award. *Boyd v. Boyd*.

3. Attachment refused upon an award which found a debt, but contained no order to pay. *Edwards v. Matthews*.

RAIL BOND.

BANKRUPT.

See ASSUMPTION OF DEBT. 1. Where a bankrupt is bound for the Plaintiff in an action by a

his agreement in a contract entered into with a bankrupt, before his bankruptcy, it is no ground for setting aside the verdict, that it did not appear that 100l. of the stipulated creditor's debt was contracted within six years before the winding up of the commission.

2. A release executed by the bankrupt after an act of bankruptcy, to a relessee who knows of the bankrupt's insolvency, is not valid, although executed more than two months before the winding up of the commission.

3. Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, a Plaintiff sues for the numbers actually delivered; although the contract be not reduced into writing, and was required by the statute of frauds.

Mayer, Assignee of W. H. Pym, v. Pym, Page 285
 4. A horse dealer, and livery-stable-keeper, after his death his widow carried on the business of the livery-stable, and bought horses to let, which she occasionally sold to customers.

Held, per Abbott C. J. at Nisi Prius, a sufficient trading to support a commission of bankruptcy against the widow. *Martin and another, Assignees of a Bankrupt, v. Nightingale*, Page 421

5. The 5 G. 4. c. 98, which repealed the former bankrupt acts, enacted, that after June 1824, a bankrupt's certificate should not be received in evidence unless entered of record.

Li 11

The 6 G. 4. c. 16, repealed the 5 G. 4. c. 98. from May 2d, 1825, and the old statutes from September 1st, 1825; it provided also, that its enactments respecting certificates should take effect from May 2d, 1825, and that certificates on commissions issued after the act took effect, should be entered of record. "The present practice in bankruptcy," was, by s. 135, to be continued, unless when alterations were expressly declared.

Where a commission was issued in January 1825, and the certificate obtained in November 1825,

Held, that it need not be entered of record. *Tattle v. Grimwood*, Page 493

BANKER.

See TROVER, 1, 2, 111

BANK NOTE.

See TROVER, 1, 5.

BARON AND FEME.

1. Where a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessaries furnished for her support. *Houleston v. Smith*, Page 127

2. A wife having carried on business on her own account during the imprisonment of her husband, and he having returned to live with her after his discharge, Held, on motion for a new trial, after

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after a verdict against him, that he was liable for articles furnished in this business, with his knowledge, after his return, though the invoices and receipts were in the name of the wife, and she was rated to and paid the poor's and paving rates. *Petty v. Anderson.*

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BASTARDY.

See INSOLVENT, 1.

Held, upon motion for a new trial, that the mother of an illegitimate child might recover, in an action for money had and received, money deposited with a parish-officer to meet any charges to which the parish might be liable in respect of the child. *Clarke v. Johnson and Another.* 424

BILL OF EXCHANGE.

See TROVER, 2. PLEADING, 10, 11.

Bills having been drawn on the Defendants by their agent and with their authority, in respect of a property which they afterwards transferred to A., they requested A. to place funds in their hands to meet the bills when due, saying, "It would be unpleasant to have bills drawn on them paid by another party." A. placed funds accordingly; but when the bills were left with Defendants for acceptance, no acceptance was written on them. A.'s agent having complained to one of the Defendants on the subject, he said, "What! Not accepted?"

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We have had the money, and they ought to be paid; but I do not interfere in this business: you should see my partner's."

Held, that all this amounted to a parol acceptance of the bills on which the Defendants were liable to an indorsee, between whom and A. there was no privity. *Fairles and Others v. Herring and Others.* Page 625

BOND.

See INSOLVENT, 4.

1. T. having a banking account with Plaintiffs, on which he was indebted to them 10,000*l.* in 1822, Defendants then executed a bond, conditioned to secure Plaintiffs for any sums which for ten years Plaintiffs should advance on bills, &c. which T. should from time to time draw on them or make payable at their house, and all cheques, &c. not exceeding 5000*l.* in the whole. It was agreed that this bond should not affect a prior security given to Plaintiffs by T. in 1817; but no notice was given to Defendant by Plaintiffs that T. was indebted to them 10,000*l.* at the time the Defendant executed his bond; T., however, saw the accounts every fortnight, and received the vouchers half-yearly.

At the close of his account, T. was indebted to the Plaintiffs more than 10,000*l.*, but subsequently to the executing of the Defendant's bond, he had paid into the Plaintiffs' bank more than 5000*l.*:

Held,

Held, that the Defendant was liable to the extent of 5000*l*.

Held, also, that the Defendant's bond did not require a 25*l*. stamp. *Williams and Others v. Rawlinson.* Page 71

2. A bond for resigning a living in favour of one of two brothers of the patron is void. *Fletcher v. Lord Sondes.* 501

BROKER.

See FACTOR, 1.

CARRIER.

The driver of a stage-coach gathered the bank on a moonlight night, and upset the coach. He had passed the spot where the accident happened twelve hours before, but in the interval a landmark had been removed. In an action for an injury sustained by this accident, the Judge told the jury, that, as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the accident having been occasioned by his deviation, the Plaintiff was entitled to a verdict.

A verdict having been returned accordingly, the Court granted a new trial, on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence. *Crofts v. Waterhouse.* 319

COSTS.

CERTIFICATE.

See BANKRUPT, 6.

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See ASSUMPSIT, 3.

CODICIL.

See WILL.

CONDITION.

See BOND, 1.

CONDITION PRECEDENT.

See INSURANCE, 2.

COPY.

See EVIDENCE, 2.

COPYHOLD.

A feme covert, entitled to a copyhold, surrendered it after secret examination by the steward, to the use of her husband, with his assent, testified by his immediate admittance: Held, that this surrender was valid. *Scamon and Others v. Mawe.* Page 378

COSTS.

See ATTORNEY, 3.

1. The circumstance that the Plaintiff's cause has been conducted by one who is not an attorney does not deprive the Plaintiff of his right of full costs against Defendant. *Reeder v. Bloom.* 9
2. The Court will not stay the proceedings in a writ of right till the

COVENANT.

the costs of a prior ejectment are paid. *Chafeld and Wife, Demandants; Souter, Tenant.*

Page 167

3. Where there were three verdicts; the first in favor of the Plaintiff, the second in favor of the Defendant by reason of a misdirection, and the third in favor of the Defendant upon the merits, and the rule for the first new trial reserved the consideration of costs, the Court allowed the Defendant to take the costs of the first or second, at his option, and the costs of the third. *Body v. Esdaile.* 174
4. A tender and payment into Court, by which the Plaintiff's claim is reduced below 40s., will not entitle the Defendant to enter a suggestion on the London court of conscience act, although the issue on the tender is found for the Defendant. *Wainell v. Atkinson.* 289
5. Costs not allowed in *quare impedit*. *Wyndowe v. The Bishop of Carlisle and Fletcher.* 404

COURT OF REQUESTS.

See COSTS, 4.

COVENANT. (In restraint of Trade.)

See VENUE, 2.

Declaration, that the Defendant, on the considerations mentioned in a certain deed, (which the Plaintiff brought into court,) agreed to submit to certain particular restraints in the carrying on of his trade, which agreement

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DEED, CONSTRUCTION OF. 661

he afterwards violated; Held, on general demurrer, that this was a sufficient statement of the consideration for the restraint agreed to. *Homer v. Ashford and Another.* Page 322.

DAMAGES.

See REPLEVIN, 1. INTEREST, 2.

DEDICATION, TO THE PUBLIC.

See EVIDENCE, 7.

DEED.

See EVIDENCE, 2.

DEED, CONSTRUCTION OF.

1. By deed of 1750, lands were limited to the use of such person as *H., D., M.,* and *C.* should by their joint deed, in the presence of two witnesses, appoint;

And for default of such appointment, to the use of such person as *H., D.,* and *M.,* in case they should all survive *C.,* by their joint deed, in the presence of two witnesses, should appoint;

And in default of, and until such appointment,

Part of the premises to *C.* for life, without impeachment of waste;

And that part after her decease, and the rest of the premises, to the use of such person as *H.* by deed, in the presence of two witnesses, should appoint;

Y y And

And for default of, and until such appointment, to *H.* and his heirs for ever.

By a settlement made in 1751 on the marriage of *M.* with *R.*, and attested by three witnesses, *H.*, *D.*, *M.*, and *C.* granted, bargained, sold, released, confirmed, directed, limited, and appointed the premises to *L.* and his heirs, to the uses, trusts, intents, and purposes thereafter expressed, limited, and declared concerning the same; among which was a term of 500 years in trust to the use of *L.*, to raise portions for younger children by sale or mortgage of the premises thereby granted and released, so as that thereby none of the prior estates in the premises should be impeached and incumbered; and

H., *D.*, *M.*, and *C.* covenanted that they (or one of them) were seised of the premises by them thereby granted and released for an absolute estate of inheritance, and that they would make such farther assurance of the premises thereby released, settled, or assured, as should be required:

Held, that the legal fee of the premises did not become vested in *L.* *Wynne v. Griffith.*

Page 179

2. Settlement of premises to *T. S.* and his heirs, to the use of *W. T.* and his heirs, until a marriage between *R. T.* and *E. G.*, then to the use of *W. T.* for the life of *R. T.*, with several limitations over on the death of *R. T.*, in favor of his wife and children; with a term for 300 years in

T. S., to commence on the death of *R. T.*, for securing a rent-charge to the wife of *T. S.*, and to determine on the performance of that trust, and subject to the foregoing, to *W. T.* and his heirs:

W. T. died before the marriage of *R. T.*, who was his heir at law, leaving a will and executors: Held, that the executors did not take any interest in the premises, and that *R. T.* took a fee in them, subject to the term for 300 years. *Trevelyan v. Trevelyan and Others.* Page 616

DEVISE.

See FORFEITURE, 1.

1. Devise of lands and personalty, in trust out of the rents to apply 250*l.* a year to the maintenance of devisor's daughter till she should be twenty-one, or marry, and out of the residue as much as should be thought necessary for the maintenance of devisor's son till he should be twenty-one or his sister marry, and upon his attaining twenty-one or his sister's marrying, to raise 5000*l.*, and pay the interest of it to the daughter after her attaining twenty-one or marrying; and subject thereto that the trustees should stand seised of the residue in trust for the son till he attained twenty-one, and then to the use of the son, his heirs, executors, and administrators for ever: But in case the son should die under twenty-one and the daughter survive, or in case the son

son should live to twenty-one and afterwards die without lawful issue,—to the use of the trustees till the daughter attained twenty-one or married, and then to the use of the daughter for life, with divers remainders over :

Held, that the trustees took the legal estate till the 5000*l.* was raised, and that but for the intervention of the trustees the son would have taken a fee with an executory devise over in the event of his dying without issue living at the time of his death.

Glover v. Moncton. Page 13

2 By a will reciting that the deviser was seised of divers freehold and certain copyhold estates in *I.*, under mortgage for a certain sum to *R.*, deviser gave all his said freehold and copyholds to *P.* and *A.* in trust for certain purposes; the residue of his freehold, leasehold, and copyhold estates he gave to *S. P.*

At the time of making his will and of his death, the deviser was also seised of twenty-one acres in *I.*, not under mortgage, and of various leaseholds :

Held, that the twenty-one acres passed to *S. P.* under the residuary clause. *Pullen and Others v. Pullen and Others.* 47

3. Devise of lands to *A.* for life, remainder to *B.* in fee, subject to and charged with the payment of 20*l.* a year to *C. D.* during her life, to be paid by *A.* as long as she should live, and after her decease to be paid by *B.* :

Held, a charge on the land,

for which *C. D.* might distrain. *Buttery v. Robinson.* Page 392

4. Devisor directed that his rents should be applied in paying *M. D.* and *F. D.* the interest of sums charged on his freehold property; and subject thereto in paying *A. D.*, widow of his son *R.*, 10*l.* a year till death or second marriage; that the remainder of the rents should be applied to the maintenance and education of *J. D.*, his grandson, till he was twenty-one, and if he should die before, to the maintenance and education of his grand-daughter, *M. F. D.* That after *J. D.* and *M. F. D.* should have attained twenty-one, *W. D.*, his son, should have an annuity of 20*l.* out of the rents for the term of his life, subject as aforesaid; the remainder of the rents were devised to *A. D.* for the life of *W. D.*, or till her second marriage: after the death of *W. D.*, deviser gave the premises to the use of *J. D.* and his heirs; and if *J. D.* should die before the period aforesaid without lawful issue living at his death, he gave the rents to *W. D.* for his life, subject as aforesaid; and after the death of *W. D.*, to his children, share and share alike, and in default of such issue, to *A. D.* and her heirs. Devisor died, leaving *A. D.*, *J. D.*, *M. F. D.*, and *W. D.*—*W. D.* being his heir at law:—*A. D.* next died, intestate and unmarried; *J. D.* afterwards attained twenty-one, and died unmarried, in the lifetime of *W. D.* :

Held, that on the death of

Y y 2

J. D.,

J. D., W. D. became entitled to an estate for life in the lands. *Mason v. Robinson and Others.* Page 621

C. devised lands to a feme covert for her life, and then, to the intent that she or her husband should not be entitled to receive the rents of the tenant, appointed trustees to receive them, pay them over to the wife, and attend to repairs; with power to distrain, lease, &c. By a codicil *C.* revoked the devise in the will, the trustees named therein having died, and devised the land to other trustees, to the same intents, and in the same manner in all respects, as if the new trustees had originally been named trustees in the will:

Held, that the new trustees took the legal estate in the land. *Tenny dem. Gibbs and Others v. Moody.* 3

DISTRESS.

See LANDLORD AND TENANT.

1. Plaintiff entered a farm under an oral agreement for a lease for ten years; though the *time* of paying rent was settled, it did not appear what was the *amount* to be paid; the lease was never executed; but Plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years:

Held, that the lessor might distrain. *Knight v. Bennett.* 361

2. By agreement, as well as by custom of the country, a tenant was to have the use of the barns

and gate-rooms to thrash out his corn and fodder his cattle till the *May-day* after the expiration of his term; his term expired at *Michaelmas 1824*; he was then restrained by injunction from carrying off the premises corn in straw: in *January 1825* his landlord distrained a rick of corn on the premises: Held, that the distress was valid. *Knight v. Bennett.* Page 364

EJECTMENT.

See FORFEITURE, 1. EXECUTION, 1. INSOLVENT, 2.

ERROR.

See PLEADING, 6. PRACTICE, 17.

1. The Court will not interfere with the allowance of a writ of error. *Jones v. De Lisle.* 125
2. The record stated a verdict for Plaintiffs on twelve counts, and that the jury were discharged on eight others.

The issues on these latter counts being immaterial, the Court refused to reverse, on error, the judgment for the Plaintiff, on the ground that the discharge of the jury was not stated on the record to be with the consent of the parties. *Powell and Others v. Sonnett and Others.* 381

EVIDENCE.

See ACTION ON THE CASE.

1. To fix a Plaintiff with knowledge of

of a general notice by which a coach proprietor had limited his responsibility, it was proved that the Plaintiff had taken in for three years a newspaper in which the notice had been advertised once a week; the jury having nevertheless found a verdict against the proprietor, the Court refused a new trial. *Rowley v. Horn.* Page 2

2. The Defendant, after settling a draft of articles of partnership with the Plaintiff, having engrossed and executed a deed, differing in some respects from the draft of the articles, the Plaintiff refused to execute the deed; but having afterwards commenced an action for breach of agreement to take him into partnership, he moved to be at liberty to inspect and copy the deed. The Court refused to order such inspection. *Ratcliffe v. Bleasby.* 148

3. Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it: Held, that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents. *Taplin v. Atty.* 164

4. The Plaintiff had lost his part of an agreement under seal after it had been duly stamped.

At the trial of an action on the agreement, the Defendant, upon notice, produced his part,

unstamped, and the Plaintiff the draft of the agreement:

Held, that the Defendant's part, unstamped, might be received in evidence. *Munn v. Godbold.* Page 292

5. Where a petitioning creditor's debt was vacated by his giving the bankrupt a check on the petitioning creditor's banker:

Held, that to establish the debt the payment of the check must be proved. That it was not sufficient (especially where the bankrupt's papers came to the hand of the petitioning creditor) to show the check to have come to his hands again, and that his bankers, the day after the date of the check, paid on his account to the bankrupt's bankers a sum corresponding with the amount in the check. *Bleasby and Another, Assignees of Byers, a Bankrupt, v. Crossley and Others.* 430

6. The Defendant having published imputations against the Plaintiff as envoy of the state of *Chili*, and the Plaintiff in a declaration for libel having stated as matter of inducement, that he was envoy of that state: Held, upon motion for a new trial, that the admission of these two facts upon the face of the alleged libel was sufficient proof of them to enable the Plaintiff to sustain his action. *Yrisarri v. Clement.* 432

7. Persons had for some years been in the habit of passing up and down a new unpaved and unfinished street, which terminated

in fields, where other houses were built.

A jury having found a dedication to the public, the Court refused to grant a new trial, which was moved for on the ground that this was not sufficient evidence of a dedication.

Jarvis v. Dean. Page 447

8. A party who sues another for arresting him on an illegal warrant is not bound to produce the warrant. *Holroyd v. Doncaster.*

492

EXECUTION.

See AWARD, 1.

Several crops having been taken under an *habere facias possessionem* issued on an ejectment brought against a tenant for holding over, the Court refused a rule for the lessors of the Plaintiff to pay over the value of them to the Defendant after deducting the amount of rent due. *Doe dem. Upton and Others v. Witherwick.*

11

EXECUTOR.

See AWARD, 1.

When a rectory falls vacant, the advowson of which belongs to a prebendary in right of his prebend, and the prebendary dies without having presented, the presentation does not belong to his personal representative. *Rennell v. Bishop of Lincoln.* 223

FACTOR.

FACTOR.

A. and B. having, by their brokers, purchased cottons, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of *A.* Immediately after the purchase, *B.* paid *A.* one-half the value: When considerable purchases had been made, the brokers were informed that *B.* had an interest in the goods purchased; *A.*, after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers; as a security for which, the whole of the warrants were deposited with *C.* by the brokers:

While they were so deposited, the brokers, upon directions from *A. and B.*, divided the goods held on their joint account, by appropriating specific warrants to each party, having first obtained them from *C.* for that purpose: Before the bills became due, the brokers were directed by *A.* to get one half renewed: *C.* having discounted fresh bills for this purpose, the brokers left in the hands of *C.*, as a security, the warrants belonging to *B.*; *C.* not knowing that *B.* had any interest in them:

Held, that *B.* might recover from *C.* in respect of the goods thus pledged to him by *A.* *Williams and Others v. Barton and Another.* Page 139

FEME

FEME COVERT.

See COPYHOLD, 1.

FINE.

By a marriage settlement, an estate was limited to the use of husband and wife for life, with remainders over to the children of the marriage, and in default of issue, to the right heirs of husband and wife: There was a power in husband and wife to charge the estate during their lives, and a power to certain trustees, in whom the legal estate was vested, to sell on the direction of the husband and wife, or the survivor:

The husband and wife borrowed money by way of annuity; created a term of 1000 years, and levied a fine to G. in fee, which, by a deed to lead the uses, was declared to be "in trust to secure the regular payment of the annuity, and to corroborate the said term:"

Held, that this fine did not extinguish the trustees' power to sell under the direction of the wife. *Sir J. Tyrrell v. Marsh.*

Page 31

FOREIGN JUDGMENT.

Unless the contrary be shewn, the Court will presume that the decision in a foreign judgment is consonant to the justice of the case. *Arnott v. Redfern and Another.* 353

FORFEITURE.

See EXECUTION, 1.

In ejectment to recover premises forfeited for non-payment of rent, a difference between the amount of rent proved to be due and the amount demanded in the lessor of the Plaintiff's particular is not material. *Tenny dem. Gibbs and Others v. Moody.* Page 3

FORMEDON.

See PRACTICE, 1.

FRAUDS, STATUTE OF.

See BANKRUPT, 3.

"Messrs. Morley and Co. — We hereby promise that your draft on *William Clarke, Son, and Co.* due at Messrs. *Mastermans'* at six months, on the 27th of *November* next, shall be then paid out of money to be received from *St. Phillip's church*, say amount 174l. 13s. 5d. — *W. Clarke, W. Boothby:*"

Held, that this undertaking was void within the statute of frauds, no consideration appearing for *Boothby's* promise. *Morley and Others v. Boothby.* Same v. *Boothby and Clarke.* 107

FREIGHT.

See ASSUMPSIT, 2.

INFANT.

Where liable to costs. *Page v. Thompson.* 609

Y y 4

INSOL-

INSOLVENT.

1. Obligors in a bastardy bond discharged under the insolvent debtor's act subsequently to a judgment on the bond, are liable for expences incurred in respect of the bastard subsequently to their discharge. *Davies and Others v. Arnott and Others.*

Page 154

2. Under 1 G. 4. c. 119. the provisional assignee of the insolvent debtor's court may, without application to that court, sue in ejectment for property assigned to him. *Doe d. Clarke and Others v. Spencer.* 203
3. This Court will not stay the proceedings in an action brought by the provisional assignee of the insolvent debtors' court, on an objection that it was not proved at the trial of the cause that the assignee had, pursuant to 1 G. 4. c. 112. s. 11., the authority of the insolvent's debtors' court to proceed. *Doe d. Spencer v. Clarke.* 370

4. *A.* agreed to sell to *C.* a copyhold, the legal title to which had, by mistake, been conveyed to *B.*

A. subsequently was discharged under the insolvent debtors' act:

After his discharge, *B.* surrendered the copyhold to *A.*, who surrendered it to *C.*, and *C.* paid the purchase money to *D.* on *A.*'s behalf:

Held, that *A.*'s assignee, under the insolvent debtor's act, might recover this money from *D.*

Held, also, that *D.* might retain out of it his charges for con-

ducting the sale of the copyhold, and the amount of a bond, which, at the time of the agreement to sell the copyhold, *A.* had given to *D.*, with a promise to pay it out of the proceeds of the sale. *Twiss, assignee of Wragg, an insolvent, v. White.* Page 486

INSURANCE.

See PLEADING, 4.

1. An association of shipowners for the mutual insurance of each other's ships, in which each member is only liable to the extent of his subscription, is not illegal under the 6 G. 1. c. 18.
2. Where, by the terms of a policy, losses were to be paid in three months after an adjustment by a committee of the insurers, and the committee refused to adjust upon the request of the insured: Held, he might sue on the policy, notwithstanding there had been no adjustment. *Strong v. Harvey* 304

INTEREST.

1. The rate of interest for loans advanced within the dominions of native and independent *Indian* sovereigns, by *British* subjects domiciliated and residing within such dominions, is not limited to 12 per cent. *House of Lords.* 193
2. Where, after the creditor has endeavoured to obtain payment, there has been a wrongful withholding of a debt arising out of a contract which does not carry interest,

interest, the jury may allow interest in the shape of damages for the unjust detention of the money. *Arnott v. Redfern and Another.* Page 353

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE, 15.

JOINDER IN ACTION.

1. Persons in partnership as bankers may, without shewing the proportion of their respective shares, join in an action for a libel against them in respect of their business. *Forster and two Others v. Lawson.* 452
2. Where several persons jointly interested, agreed to horse a coach, each of them one stage, on the road from *L.* to *B.*, and that in case of default one of them should sue the defaulter for a penalty which should be divided among the non-defaulters: Held, that an action might be maintained on the agreement against a defaulter, by the party so appointed to sue, and that the others need not join in the action. *Radenhurst v. Bates.* 463

LANDLORD AND TENANT.

See DISTRESS, 1, 2. USE AND OCCUPATION. EXECUTION.

1. The Plaintiff who had occupied lands under *A.*, upon *A.*'s, death

entered into an agreement to pay rent to the Defendant, and paid 1s. as an acknowledgment of his title, being ignorant that it was disputed:

It turning out afterwards that the Defendant had no claim to the property:

Held, that the Plaintiff might dispute the Defendant's title in a plea of *non tenuit in replevin.* *Gregory v. Doidge and Another.* Page 474

LIBEL.

See EVIDENCE, 6. JOINDER IN ACTION.

1. Plaintiff, a surgeon, petitioned parliament against quacks:

Defendant, a journalist, commented severely on the contents of the petition, and charged the Defendant with ignorance of his profession, pointing out ignorance of chemistry, which, he said, appeared on the face of the petition:

Plaintiff then sued Defendant for libelling him in his profession of a surgeon:—the Judge directed the jury, that if they considered the Defendant's attack a fair comment on the Plaintiff's petition,—if the charge of ignorance was collected from the petition alone, and was not the spontaneous effusion of malice in the Defendant,—the writing in question was no libel; he also directed them to consider whether the Defendant had imputed to the Plaintiff ignorance in his profession of a surgeon, or ignorance

rance of chemistry, for if they thought the latter, the declaration was not adapted to the Plaintiff's case.

The jury having found a verdict for the Defendant, the Court granted a new trial, costs to abide the event.

Quere, Whether a petition to parliament on matters of general importance is such a publication as renders the petitioner an object of fair criticism and comment. *Dunne v. Anderson*.

Page 88

2. To say of one who carries on the business of a corn vendor, "You are a rogue and a swindling rascal; you delivered me 160 bushels of oats worse by 6d. a bushel than I bargained for," is actionable, and entitles him to a verdict without proof of special damage. *Thomas v. Jackson*.

104

3. An action of libel does not lie for any thing written against a party touching his conduct in an illegal transaction; but for misconduct imputed to him in any matter independent of the illegal transaction, though arising out of it, an action lies.

4. Held, that the following passage, "The Plaintiff lost no time in transferring himself, together with 200,000*l.* sterling of *John Bull's* money, to *Paris*, where he now outtops princes in his style of living," did not impute to the Plaintiff having committed a fraud on the *English* nation. *Yrisarri v. Clement*.

432

LIMITATIONS, STATUTE OF.

1. The following letter from the Defendant to Plaintiff's attorney, was given in evidence by a Plaintiff in answer to a plea of the statute of limitations:—"I have received yours respecting Plaintiff's demand; it is not a just one; I am ready to settle the account whenever Plaintiff thinks proper to meet on the business; I am not in his debt 90*l.*, nor any thing like that sum; shall be happy to settle the difference by his meeting me."

Held, that the Judge was justified in directing the jury, "that after this letter the statute of limitations was out of the question."

Per Burrough J. A statement made by a counsel upon his address to the jury, but in the hearing of his client, is binding on the client if he makes no objection. *Collidge v. Horn*.

Page 119

2. Defendant being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill that I gave is on a three-penny receipt stamp, and I will never pay it:" Held, not such an acknowledgement as would revive the debt against a plea of the statute of limitations. *A'Court v. Cross*.

329

3. Where, to a plea of the statute of limitations, the Plaintiff replies a promise within six years, and proves a promise to pay *when of ability*, made three years after the original cause of action accrued,

accrued, and within six years of the commencement of the action:

Held, he must also prove the Defendant's ability.

Burrough J. and Park J.' dissentientibus. Scales v. Jacob.

Page 638

MAGISTRATE.

See TRESPASS, 1.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 1. BASTARDY, 1.

PARTIES.

See JOINDER IN ACTION. AWARD, 1. ASSUMPSIT, 2. VESTRYMEN.

PARTNER.

See ARBITRATION, 1.

PAYMENT.

See BOND, 1.

PLEADING.

See JOINDER IN ACTION, 1, 2. VENUE, 2.

1. In replevin, avowry was made in respect of a right of common claimed by the corporation of *Alnwick* under a grant from the *De Vesci*.

The Plaintiff pleaded that the corporation had been accustomed to appoint a *reasonable* number of herds for, *among other things*, superintending the common and

beasts on it, and also to appoint, for the pains of each herd, a *reasonable* and proper number of stints of each such herd, to be depastured upon the common:

Held, sufficient after verdict.

Elliott v. Hardy. Page 61

2. Declaration for assault, battery, and tearing clothes.

Plea, that Defendant was not guilty of the said supposed assaults in manner and form as the Plaintiff complained:

Held, that the *modo et formâ* included a denial of the battery and *laceravit*, as well as the assault. *Weathrell v. Howard.*

135

3. The declaration stated a rule of court, by which it was ordered, that the proceedings in this action should be stayed; that the Defendant should be discharged out of custody; and that Plaintiff should deliver up the bill of exchange on which the action was brought:

Held, a sufficient allegation of the termination of the first suit to support an action for a malicious suit. *Brook v. Carpenter.*

303

4. Where the regulations of an association of ship-owners, combined for the mutual assurance of each other's ships, were indorsed on the back, and were declared to form part of a policy of insurance, to which they were subscribers: Held, that the declaration in an action for a loss under the policy ought to set out the regulations as well as the policy. *Strong v. Rule.* 315

5. The

5. The Plaintiff prescribed for a right of sole pasture "from the feast of *St. Thomas* until the 18th of *April*," and proved the exercise of the right between those periods:

Held, on motion to set aside a nonsuit, that it was not necessary to allege the right in the pleadings from *Old St. Thomas's day*.
Smith v. Flower. Page 401

6. Averment in a declaration on the gaming act, that the party lost to the Defendant by playing at *rouge et noir*:

Held, sufficient on error, without alleging the money to have been lost by playing *with* him.

2. The Plaintiff having sued *qui tam*, alleged the loss at the parish of *St. James*, in the county of *Middlesex*:

Held, sufficient in error, although in *Middlesex* there are the parishes of *St. James*, *Clerkenwell*, and *St. James* in the liberty of *Westminster*.
Taylor v. J. Williams. 449

7. Plaintiff purchased a horse for 55*l.*, the Defendant warranting him sound, and agreeing to give 1*l.* back if the horse did not bring Plaintiff 4*l.* or 5*l.*

The averment in the declaration was, that in consideration the Plaintiff would buy of the Defendant a horse for a certain price, to wit, 55*l.*, the Defendant undertook the horse was sound:

Held, a variance, *Gaselee J. dissentiente.* *Blyth v. Bampton.*

472

8. Declaration, that in consideration Plaintiff had delivered to

Defendant a watch to repair, Defendant undertook to repair and re-deliver it to the Plaintiff.

Breach, non-delivery; evidence; that Defendant repaired and tendered the watch to Plaintiff, who said: "Take it to my uncle in *M.*, who will pay for it," when the Defendant took it to another uncle, who lost it:

Held, no variance. *Wilson v. Powis.* Page 633

9. Several pleading. Inconsistent pleas not allowed, except under an affidavit of their necessity.

635

10. The declaration on a bill of exchange stated it to have been drawn payable to the order of the drawer in *London*, and accepted by the Defendant at *London*, according to the usage of merchants;

Held, that averment and proof of presentment for payment in *London*, or of excuse for non-presentment in *London*, were unnecessary. *Selby v. Eden.* 611

11. Where the acceptor of a bill of exchange accepts it payable at a banker's, it is not necessary in an action against the drawer to allege that the bill was presented to the acceptor in person, if there is an averment that it was duly presented at the bankers. *De Bergareche v. Pillin.* 476

POWER.

See FINE.

A trustee having a power to sell an estate of which the *cestui que* trust was tenant for life without impeachment

impeachment of waste, sold and conveyed the land only, received the money for it, and applied it to the purposes of the trust; the *cestui que* trust, by the same conveyance, sold and conveyed the timber, and received the money for it:

Held, that the power was not well executed. *Cholmeley v. Paxton.* Page 207

PRACTICE.

See AWARD, 3. EVIDENCE, 2. TROVER, 3. INFANT. VENUE, 1. ATTORNEY, 3.

1. Demandant allowed to withdraw demurrer, and reply *de novo* in a writ of formedon, upon showing good ground by affidavit. *Cholmeley v. Paxton.* 1
2. Where a first *capias* is issued on an affidavit of debt filed with the filacer of one county, if, instead of a *testatum*, a second *capias* is issued into another county, a new affidavit of debt must be filed with the filacer of the second county. *Dorville v. Whoomwell.* 39
3. Where, in a special case, judgment was given for the Defendant on a point not mentioned in the case or argument, and on a supposed state of facts, collected by the Court from a document appended to the case, but the reverse of those which really took place, — the Court refused to stay proceedings or reconsider the case without the Defendant's consent, — although a statement of the real facts as to this point, contained in the case when agreed

on by the Defendant's junior counsel, engrossed, and signed by the Plaintiff's leading counsel, had been afterwards struck out by the Defendant's counsel, because not enumerated in a collection of facts agreed on at the trial of the cause with a view to the special case; but the statement was never disputed; and the Defendant's counsel had been instructed to direct, and had directed, the argument exclusively to another point. *Pike v. Carter,* Page 85

4. Affidavit to hold to bail on the ground that Defendant was indebted to Plaintiff in trust for Deponent, under a deed by which the Defendant had covenanted to pay "at certain times and on certain events now passed and happened:" Held, sufficient. *Barnard v. Neville.* 126
5. In C. B., provided there be fifteen days between the teste of the first and the return of the second, a second writ of *scire facias* may be tested and issued before the *quarto die post* of the return of the first.
Sunday may be reckoned as a day in one of the four days which must elapse between the return of the second writ and signing judgment. *Combe and Others v. Cuttill.* 162
6. Subpœna. *Thorpe v. Graham.* 223
7. Where a plaintiff does not appear, a verdict cannot be taken against him, though the Defendant pleads a tender. *Anderson v. Shaw.* 290
8. Arrest

8. Arrest under the name of *Stephen T. Silk*. Bail-bond executed in the name of *Stephen Thomas Silk*: Held, ill. *Lake v. Silk*.
Page 296
9. Where, upon the day appointed for the trial of a writ of right, only three of the knights appeared, and the sheriff returned, that the fourth was too ill to appear in that or the ensuing term, which return was confirmed by the affidavit of a medical man, the Court granted a summons for another knight. *Tooth v. Bagwell*. 373
10. In a writ of right, the sheriff having returned, that he had summoned four lawful knights, to wit, *A. B., Esq.; C. D., Esq.; E. F., Esq.; and G. H., Esq.*: Held, on demurrer, that this return could not be traversed. *Angell v. Angell*. 393
11. Trial at bar; what circumstances insufficient to support an application for. *Angell v. Angell*. 397
12. Sending process by the post in a letter which the Defendant refuses to receive, is not good service, although the refusal may have been wilful, and accompanied with a long avoidance of service. *Redpath v. Williams*. 443
13. At the trial of a writ of right the tenant must begin. *Tooth v. Bagwell*. 446
14. Demandant took the record down to the assizes. The cause was made a remanet. At the next assizes the tenant appeared, but the demandant did not, try.

- The Court refused to allow the tenant to enter judgment as in case of a nonsuit. *Demman, Demandant; Ball, Tenant*.
Page 499
15. Bail. Commissioner's authority. *Moore v. Kenrick*. 603
16. Where, in ejectment, the tenants in possession, — having undertaken to appear, enter into the common consent rule, plead *instantier*, and take short notice of trial, — made no defence at the trial, but sued out a writ of error when judgment was signed, the Court allowed the lessor of the plaintiff to take his judgment against the casual ejector. *Doe dem. Morgan v. Roe*. 169

PRESENTATION.

See EXECUTOR, 2.

PROVISIONAL ASSIGNEE.

See INSOLVENT, 2.

PUFFERS.

See AUCTION, 1.

QUARE IMPEDIT.

See COSTS, 5.

RECOVERY.

1. Recovery. Affidavit of presentation necessary to admit the word "advowson" in an amendment. *Holmes, Demandant; Seton, Tenant; Foreman, Vouchee*. 176
2. Where

RESIGNATION-BOND.

2. Where the vouchee became insane between the time of executing the warrant of attorney and the passing of the recovery, the Court refused to pass the recovery. *Walcott, Vouchee.*

Page 423

3. A part of the premises named in the deed to lead the uses had been omitted in the copy of the *præcipe*, which precedes the warrant of attorney: the Court said, they could not apply the warrant of attorney to premises not named in the *præcipe*, and refused the amendment. *Oddie, Demandant; Foster, Tenant; Earl of Plymouth, Vouchee.* 446

REHEARING.

See PRACTICE, 3.

RENT-CHARGE.

See DEVISE, 3.

REPLEVIN.

See PLEADING, 1. LANDLORD AND TENANT.

In an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin-bond cannot recover as special damage (beyond the penalty of the replevin-bond) the expenses of a fruitless action against the pledges, unless he gives the sheriff notice of his intention to sue them. *Baker v. Garratt and Another.* 56

RESIGNATION-BOND.

See BOND, 2.

SURRENDER. 675

RIGHT OF WAY.

See WAY, 1.

RULE OF COURT,

Page 442

SCI. FA.

See PRACTICE, 5.

SERVICE OF PROCESS.

See PRACTICE, 12.

SET-OFF.

See INSOLVENT, 4.

SLANDER.

See LIBEL, 2.

STAMP.

See EVIDENCE, 4. BOND, 1.

STATUTES, CONSTRUCTION OF.

See BANKRUPT, 3. TURNPIKE.

SUBPŒNA.

See PRACTICE, 6.

SURRENDER.

See COPYHOLD, 1.

TENDER.

1. Where a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, will not support a plea stating that a certain

certain proportion of the sum offered was tendered for one of them.

2. An offer of a certain sum in full of a demand is not a legal tender. *Strong v. Harvey.* Page 304

TITHES.

1. An agreement to take tithes of wheat by one sheaf taken at varying intervals out of each of many shocks of ten, is not illegal. *Collier v. Jacob.* 106
2. To place a wheat crop in shocks of varying numbers, and throw out the tenth sheaf, is not a legal mode of setting out tithes, although there be no fraud. *Walker v. Ridgway.* 317

TRESPASS.

1. Trespass does not lie against a magistrate for any thing done in the discharge of his duty, unless he is made acquainted with all the circumstances under which he is called on to act. *Pike v. Carter.* 78
2. Though the freehold of the church-yard is in the parson, trespass lies for the erector of a tomb-stone against a person who wrongfully removes it from the church-yard and erases the inscription. *Spooner v. Brewster.* 136

TROVER.

1. The Defendants, bankers in a small town, gave notes of their own to a stranger, of whom they asked no questions, in exchange for a 500*l.* Bank of England note:

Held, that the Plaintiffs, from whom the 500*l.* note had been stolen, and who had duly advertised their loss, might recover the note of the Defendants. *Snow and Others v. Peacock and Others.*

Page 406

2. In an action by the owner of a lost bill of exchange against a banker who had cashed it to a stranger: Held, that the jury were properly directed to consider whether the Plaintiff had used due diligence in apprising the public of his loss, and whether the Defendant had acted with good faith and sufficient caution in the receipt of the bill. *Beckwith v. Corral and Another.* 444

3. In an action of Trover, where the value of the goods converted was not ascertained, the Court refused to stay proceedings upon delivery of the goods to the Plaintiff or payment of the value thereof. *Tucker v. Wright.* 601

4. Plaintiff being indebted to J. G., shipped goods under a bill of lading addressed R. P., with directions to him to sell the goods on Plaintiff's account, and place the net proceeds to the credit of J. G.

R. P. having pledged the goods: Held, that the Plaintiff had a sufficient title to sue in trover, and that the right to the possession of the goods was not in J. G.

Gaselee J. dissente. *Sellick v. Smith and Others.* 603

5. Defendant, according to one witness, having admitted taking "from his bankers, or at Doncaster," and according to another, "from

USE AND OCCUPATION.

“ from a stranger at *Doncaster* races, for bets won,” a 30*l.* bank of *England* note, without inquiring or taking any account of the number of the note, and the jury, in an action by the Plaintiffs, who had lost the note, and duly published their loss, having found a verdict for them, the Court granted a new trial. *Snow v. Saddler.* Page 610

TURNPIKE.

By the enacting clause of a turnpike act it was provided that there should be taken of every person attending any cattle or carriage, for every horse drawing any stage coach, the sum of 6*d.*

By an exempting clause it was added, “ that if any person should have paid the toll for passing, the same person, upon producing a ticket, should be permitted to re-pass free with the same cattle or carriage :”

Held, that the toll having been paid by the coachman on passing, for horses drawing a stage coach, a second toll could not be demanded for the same horses re-passing, though with a different coach and different coachmen, but belonging to the same proprietor. *Norris and Others v. Poate.* 41

USE AND OCCUPATION.

Where a lessee quitted, in the middle of his term, apartments
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VERDICT.

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which he had taken for a year, and the lessor let them to another tenant :

Held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year during which the apartments had been unoccupied :

Held, also, that by the admission of another tenant she dispensed with the necessity of a written surrender. *Walls v. Atcheson.* Page 462

VARIANCE.

See PLEADING, 5, 7, 8.

VENUE.

1. An affidavit that the cause of action arose in *Lancashire* and not elsewhere, having been answered by an affidavit that it arose on a contract for the purchase of 500 bags of cotton, to be shipped at *Trieste* and delivered at *Liverpool*, the Court refused to remove the venue from *London* to *Liverpool*. *Wilkinson v. Tattersal.* 428
2. In covenant against the assignee of the lessee of premises described in the declaration as situate within the liberties of *Berwick-upon-Tweed*, the venue cannot be laid in *Northumberland*. *The Mayor, Bailiff, and Burgesses of Berwick-upon-Tweed v. Shanks.* 459

VERDICT.

See PRACTICE, 7.

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VESTRYMEN.

Vestrymen who signed a resolution ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were held not to be responsible for the payment of the attorney employed by the surveyor. *Sprott v. Powell and Another.* Page 478

WAY.

Defendant pleaded a grant of right of way by deed, subsequently lost. Plaintiff, in his replication, traversed the grant. At the trial, there being conflicting testimony as to the uninterrupted use of the way, the Judge directed the jury, that if, upon this issue, they thought Defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the Defendant; if they thought there had been no way granted by deed, they would find for the Plaintiff.

Held, that this direction was right. *Levitt v. Wilson.* 115

WILL.

Three codicils of different dates

WRIT OF RIGHT.

were indorsed on a will duly attested for passing real property. The first referred to lands mentioned in the will, made a disposition of lands purchased subsequently to the will, according to directions in the will as to the devisor's lands in general. gave a legacy to the devisor's wife, and appointed her executrix, in addition to the executors named in the will; it was attested by only two witnesses. The second, which also was attested by only two witnesses, referred to lands mentioned in the will, gave directions touching the sale of a portion of them, revoked a legacy given by the will, and appointed two new executors in the room of those mentioned in the will. The third merely appointed a new executor in the room of the executor named in the second codicil, and was attested by three witnesses:

Held, that the third codicil operated as a republication of the first. *Guest v. Willacy and Others.* Page 614

WRIT OF RIGHT.

See PRACTICE, 9, 10, 11, 13, 14.
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